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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether it is an unconstitutional establishment of religion to permit voluntary student religious groups to use public school facilities for meetings outside regular school hours on the same basis as other voluntary student groups.*

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* The appellant in the court of appeals was the Lubbock Civil Liberties Union. The appellees were the Lubbock Independent School District; Monte Hasie, the president of the Board of Trustees of the School District; Jose S. Ramirez, Brad Crawford, Deaton Rigsby, Giles M. Forbess, Harold Harriger, and Lynn Stafford, the members of the Board of Trustees; and Edwin H. Irons, the Superintendent of the School District.

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LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Lubbock Independent School District, the president and members of its Board of Trustees, and its Superintendent, hereby petition for a writ of certiorari to review the judgment of the court of appeals.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 669 F.2d 1038. The opinion of the district court (App. B, *infra*) is not reported.

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[1] The president of the Board of Trustees is Monte Hasie. The current members of the Board are Jose S. Ramirez, Brad Crawford, Deaton Rigsby, Lynn Stafford, Elizabeth Sisco, and Gary O. Boren. The Superintendent of the School District is Edwin H. Irons.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on March 11, 1982. The court's order denying rehearing and suggestion of rehearing *en banc*, with dissenting opinion (App. D, *infra*), was entered on July 16, 1982. On September 22, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including November 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Paragraph 4 of the August 26, 1980, statement of policy of the Lubbock Independent School District provides:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

STATEMENT

Respondent Lubbock Civil Liberties Union instituted this civil action in September, 1979, in the United States District Court for the Northern District of Texas. Respondent contended that certain practices permitted by

petitioner Lubbock Independent School District, such as the reading of Biblical passages over school public address systems, violated the Establishment Clause of the First Amendment. Pursuant to 42 U.S.C. § 1983, respondent sought damages and declaratory and injunctive relief.[2]

The pendency of litigation caused the School District's Board of Trustees, which is authorized by state law to make rules and regulations for the School District,[3] to review existing policy and practices. On the basis of this review, the Board determined to prohibit the practices that respondent had challenged. App. B, *infra*, pp. 30a-31a. On August 26, 1980, acting, as the district court found, "in good faith in seeking to draft a proper constitutional procedure," *id.* at 33a, the Board adopted a new statement of policy "relating to religion in the schools . . . ." *Id.* at 30a-31a n.1. This policy was expressly intended to maintain strict neutrality with regard to "the belief of any student in a Supreme Being or . . . the right of any student not to believe . . . ." *Id.*

Respondent nevertheless pressed forward with its claim for damages, for a declaratory judgment that the discontinued practices had been unconstitutional, and for an injunction prohibiting resumption of those practices. In addition, respondent challenged the facial validity of Paragraph 4 of the Board's new statement of policy, which had been designed to ensure that all voluntary student groups wishing to meet before or after school

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[2] The district court asserted jurisdiction under 28 U.S.C. §§ 1331 and 1343.

[3] Tex. Ed. Code Ann. § 23.26 (Vernon). *See* App. A, *infra*, p. 4a n.4.

would have equal access to the use of school facilities. Paragraph 4 provides:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

Id.

Trial was held in November, 1980. At trial, respondent's president, Rodric Schoen, who is a professor of constitutional law at Texas Tech University, testified that, in his view, the policy of equal access was constitutionally sound on its face. Tr. 27-28.[4] He further testified that there had been no complaints by students or parents concerning implementation of that policy. *Id.*

After trial, the district court declared that the School District's discontinued practices had violated the Establishment Clause, but the court denied injunctive relief because of the absence of any continuing threat of harm and awarded only nominal damages. App. B, *infra*, pp. 32a-34a. The court further held that the School District's policy of equal access to the use of school facilities was not facially invalid:

> It is noted that this policy permits students of all groups to gather at the school, either before or after regular hours, on the same basis as other groups, so long as attendance at such meetings is voluntary. It is the undisputed testimony before this court that there will be no extra expense accruing to the Lub-

[4] "Tr." refers to the reporter's transcript of proceedings.

> bock Independent School District resulting from these meetings before or after school. In the event that such expense is incurred the group using the school facilities will be required to pay for same. Again, it is the implementation of this policy and the practices and acts thereunder that will be determinative of any constitutional violations. This court will not hesitate to assert its jurisdiction in the event that it is later shown that, pursuant to the policy, the defendants are permitting or encouraging acts or practices which violate either the establishment or the free exercise clause of the First Amendment.

Id. at 32a.

Respondent appealed to the United States Court of Appeals for the Fifth Circuit, urging that the district court had erred in denying injunctive relief and in refusing to declare invalid the policy of equal access. The court of appeals affirmed the denial of injunctive relief on the ground that the School District's discontinued unconstitutional practices were unlikely to be resumed. App. A, *infra*, pp. 22a-23a. But the court held that the School District's policy of equal access is invalid on its face.

In addressing respondent's challenge to that policy, the court of appeals applied the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971):

> does the policy or practice have a secular (non-religious) purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy or practice avoid an excessive entanglement with religion?

App. A, *infra*, p. 12a.

First, the court acknowledged that the Second Circuit "has recognized that '[a] neutral policy granting all student groups, including religious organizations, access to school facilities reflects [a] secular, and clearly permissi-

ble purpose—the encouragement of extra-curricular activities.' " *Id.* at 13a (quoting *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 71 L. Ed. 2d 109 (1981)). The court nevertheless held that the School District's policy of equal access has no secular purpose because "[i]t appears in the middle of a policy concerned with religious activities in the schools." *Id.*

Second, although the School District's stated policy refers only to meetings "before or after regular school hours on the same basis as other groups," the court characterized it as a "policy of allowing religious meetings at a time closely associated with the beginning or end of the school day." *Id.* at 15a. This, the court held, was unconstitutional:

> [It] implies recognition of religious activities and meetings as an integral part of the District's extra-curricular program and carries with it an implicit approval by school officials of those programs. This, in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings, renders the primary effect of the policy impermissible advancement of religion.

Id. at 15a-16a (emphasis in original).

Third, the court determined that supervision by school personnel, which is furnished whenever school facilities are used by voluntary student groups in order to protect both students and facilities, *see id.* at 18a-19a, "create[s] the entanglement which leads to an impermissible establishment of religion." *Id.* at 20a.[5]

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[5] The court further concluded that "Paragraph 4 is in no way mandated by the free exercise clause," *id.*, or by other provisions of the First Amendment.

Four judges dissented from the denial of rehearing *en banc*, pointing out that the court's decision appears to hold:

> (1) "that students of public schools may not meet in school facilities for religious purposes," App. D, *infra*, p. 39a;
>
> (2) "that permissible secular purposes, the development of leadership and communicative skills, can be attained only through non-religious student associations"—a holding "inconsistent with *Brandon*," *id.* at 40a;
>
> (3) that establishment of religion inheres in the fact that "the machinery of public education . . . provides the *students* themselves who get together and make the decision to form some organization to meet at any time, even after they have first departed and then returned to the school building," *id.* (emphasis in original); and
>
> (4) that "excessive entanglement [equates] with the minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," *id.* at 41a.

The dissenters concluded:

> We should not forget . . . that the young student may . . . be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. [We] would consider that a very great wrong to the children, to the Constitution and to the nation.

Id.

REASONS FOR ALLOWING THE WRIT

1. The Fifth Circuit has held that it is an unconstitutional establishment of religion for a public school board to adopt a neutral, nonpreferential policy that allows

voluntary student religious groups to meet in school facilities, before or after regular school hours, on the same basis as other voluntary student groups.[6] The issue is important. Its resolution will affect the interests of more than forty million public school students and will furnish almost ninety thousand public schools with definitive guidance concerning the extent, if any, to which they may provide an opportunity, outside school hours, for noncurricular, student-initiated religious speech and association.[7]

The Fifth Circuit's decision appears to be inconsistent with this Court's decision last Term in *Widmar* v. *Vincent*, 70 L. Ed. 2d 440 (1981). In *Widmar*, this Court held that a public university may not deny voluntary student groups equal access to the use of university facilities based upon the religious content of their speech. In contrast, the Fifth Circuit in this case has held that a public school is barred from granting voluntary student groups equal access to the use of school facilities because of what the court perceived to be a constitutionally dictated need to discriminate against religious speech. Thus, the question presented here is whether a public school *may* pro-

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[6] The decision below already has engendered discussion on the Senate floor, where its implications have been labeled "ridiculous in a free society dedicated to the principles of free thought." 128 *Cong. Rec.* S 11780 (daily ed. Sept. 17, 1982) (Senator Hatfield).

[7] In the school year 1978-79, approximately 42.6 million pupils were enrolled in public elementary and secondary schools. Department of Commerce, *Statistical Abstract of the United States* 153 (101st ed. 1980). During 1977, the fifty states and the District of Columbia operated a total of 88,025 public schools. *Id.* at 139. Puerto Rico, American Samoa, the Virgin Islands, and the Canal Zone operated an additional 1,940 public schools. *Id.*

vide voluntary student religious groups with the equal access that a public university *must* provide under *Widmar*.[8]

By holding that a public school board's policy of equal access is facially invalid, the Fifth Circuit has propounded a peculiar constitutional paradox. According to the Fifth Circuit, the Constitution *requires* public schools to discriminate against religious speech even though it *forbids* public universities from doing so. This result is inherently implausible. The Establishment Clause of the First Amendment draws no such bright line between public schools and public universities. *See Zorach* v. *Clauson*, 343 U.S. 306 (1952). Moreover, public school students, like university students, have the right of free speech on school property, even as to controversial subjects. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 512-13 (1969).

This Court should review the decision below in order to provide needed guidance to public school boards and to ensure that the First Amendment is applied even-handedly to public schools and their students in a manner that conforms with the Court's decision in *Widmar*.

2. The Fifth Circuit misapplied the three-part test of *Lemon* v. *Kurtzman*. A neutral, nonpreferential policy of equal access has a secular purpose; the principal or primary effect of such a policy neither advances nor inhibits religion; and such a policy does not foster "an excessive

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[8] Thus, the question presented here is different from that in *Brandon* v. *Board of Education of Guilderland Central School District*, where the plaintiffs contended that public schools *must* provide student religious groups with equal access to the use of school facilities.

government entanglement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

a. In *Widmar*, this Court recognized that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose . . . ." 70 L. Ed. 2d at 448-49 (footnotes omitted). A policy of equal access to school facilities affords students with similar interests an opportunity voluntarily to associate with one another in pursuit of those interests, to engage in the exchange of ideas, and to develop the skills of communication, cooperation, and self-government. Such a policy fosters the students' intellectual, cultural, and social growth and thereby furthers the essential goals of public education. Constructive extracurricular activities have obvious secular value, for they provide forums for the exercise of the First Amendment freedoms of speech and association that lie at the heart of our democracy. A policy that facilitates participation in such activities serves "a secular, and clearly permissible purpose . . . ." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 978.[9]

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[9] The court of appeals below acknowledged the secular value of constructive extracurricular activities but nevertheless disapproved the School District's policy of equal access on the ground that "[i]t appears in the middle of a policy concerned with religious activities in the schools." App. A, *infra*, p. 13a. It is difficult to grasp the point of the court's objection. The School District's general statement of policy was "concerned with religious activities in the schools," *id.*, for a wholly blameless reason: it was adopted for the purpose of terminating the practices of which respondent had complained and replacing those practices with a posture of strict neutrality toward religion. The articulation in such a context of an otherwise unobjectionable policy of equal access is not incompatible with a secular purpose or effect.

b. In *Widmar*, this Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 70 L. Ed. 2d at 450. The Court explained:

> It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Id. The same analysis applies to the School District's neutral policy of equal access to the use of school facilities. That policy benefits students, not religion or religious institutions. Like the loan of textbooks in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and the reimbursement of bus transportation expenses in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the School District's policy merely makes available to all children the benefits of a general program of access to school facilities for extracurricular purposes.

The School District's policy of equal access to the use of school facilities, like the public university's open forum in *Widmar*, "does not confer any imprimatur of State approval on religious sects or practices." 70 L. Ed. 2d at 450. The court below perceived an imprimatur of state approval in "the Texas compulsory education machinery that draws the students to school and provides any audience at all for the religious activities . . . ." App. A, *infra*, p. 17a. The School District's policy of equal access, however, deals solely with voluntary groups and student-initiated activities; it does not authorize the presentation of state-initiated religious activities to passive student audiences. Nor does the policy permit the use of school facilities during the official school day; voluntary student religious

groups are permitted to hold their meetings only outside regular school hours, *i.e.*, only at times when the "Texas compulsory education machinery" is ineffective to provide an "audience."

The lower court confused self-initiated student religious meetings held outside the school day with passive student responses to state-initiated religious programs or activities presented during school. This led the court to rely upon inapposite school prayer cases and incorrectly to identify the mere existence of state compulsory education laws with "the use of coercion to get public school students into religious classrooms." *Zorach* v. *Clauson*, 343 U.S. at 311.[10] The School District's policy of equal access, like the "released time" program in *Zorach*, entails no state sponsorship or coercion of any kind. Nor does the policy "operate[] in such a way as to infringe the rights of free exercise of [nonparticipating] children. . . ." *Abington School District* v. *Schempp*, 374 U.S. 203, 288 (1963) (Brennan, J., concurring). Students who do not wish to join in student-initiated religious activities outside school hours are perfectly free instead either to join in other student activities or to be absent from the school premises altogether, without any of the peer pressure of a class or assembly gathering.[11]

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[10] The facts that this case concerns only student-initiated activity and that the activity is conducted outside regular school hours both clearly distinguish it from such cases as *Stone* v. *Graham*, 449 U.S. 39 (1980), *Engel v. Vitale*, 370 U.S. 421 (1962), and *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 71 L. Ed. 2d 455 (1982), upon which the court of appeals relied. It is telling, in this connection, that Judge Clark, who wrote the opinion for the court in *Karen B.* v. *Treen*, dissented from the denial of rehearing *en banc* in this case.

[11] The court of appeals below speculated that the "impressionability" of public school children creates "the possibility that they would misapprehend the involvement of the District in these meetings

This Court in *Widmar* recognized that "[t]he provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect." 70 L. Ed. 2d at 450. Here, voluntary student groups of all types and descriptions—Boy Scouts, glee clubs, debating societies, chess clubs, dramatic societies, and numerous others—are eligible for the use of school facilities. The School District's nonpreferential policy of equal access merely permits student-initiated religious activities to compete in this marketplace of student ideas and activities on an equal basis. The court of appeals erred in not following this Court's determination in *Widmar* that "[a]t least in the absence of empirical evidence that religious groups will dominate . . . , the advancement of religion would not be the . . . 'primary effect.' " 70 L. Ed. 2d at 451.

c. In *Widmar*, this Court understood that a neutral "open-forum policy . . . would avoid entanglement with religion." 70 L. Ed. 2d at 448-49. The court below, how-

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. . . ." App. A, *infra*, p. 15a. But public school students not only are sufficiently mature to exercise the rights guaranteed by the First Amendment, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. at 506, but also "are surprisingly sophisticated, intelligent, and discerning." *Wilson* v. *Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976). *See also Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *James* v. *Board of Education of Central District No. 1*, 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

The court below expressed concern over the possible application of the School District's policy to primary school students. App. A, *infra*, p. 15a. But it was improper for the court to resolve its doubts on that score by holding the policy facially invalid. The court of appeals should have reserved judgment, in the manner of the district court, concerning "the implementation of this policy and the practices and acts thereunder." App. B, *infra*, p. 32a.

ever, perceived an impermissible entanglement in the fact that, whenever school facilities are used by any student group, the School District " '*furnish*[es] *personnel* . . . for protection of such properties.' " App. A, *infra*, p. 19a (quoting petitioners' Trial Br. at 3) (emphasis added by court of appeals). But content-neutral supervision of the physical premises, which constitutes only "the minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," App. D, *infra*, p. 41a, falls far short of the type of involvement in or interaction with religious affairs or activities that this Court has found impermissible in the past. *Compare, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 615-22, with *Zorach* v. *Clauson*, 343 U.S. at 308-09.

Indeed, as this Court noted in *Widmar*, a policy of discrimination against religious speech or discussion would risk greater "entanglement":

> Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

70 L. Ed. 2d at 449 n.11 (citations omitted). Similar considerations apply here. A rule prohibiting student-initiated religious activities, to be effective, would require monitoring of the meetings of many student groups, such as philosophy clubs and debating societies, for the purpose of rooting out proscribed religious content. Such a process of monitoring and censorship would be far more inimical to First Amendment values, and would entail a far greater entanglement with religion, than the disinterested supervision contemplated by the School Dis-

trict's neutral policy of equal access to the use of school facilities.

3. In enforcing the Establishment Clause, this Court remains aware that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U.S. at 669. The policy of the School District in this case is precisely one of benevolent neutrality. The School District has earnestly sought to accommodate religious and nonreligious interests on equal grounds. "Such an accommodation 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" *Wisconsin* v. *Yoder*, 406 U.S. 205, 234-35 n.22 (1972) (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963)). *See also Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 745-46 (1976).

The decision of the court below is incompatible with this Nation's historic tolerance for neutral accommodation of religious beliefs, practices, and interests. The court's opinion conveys the opposite message "that our government and the courts and the schools are hostile to all religious belief and practice." App. D, *infra*, p. 41a.[12]

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[12] The court's opinion teaches Lubbock school children that speech is "free" only so long as it is purged of religious content and that governmental "neutrality" requires invidious discrimination against their own voluntary, self-initiated religious activity. Such "[m]isconceptions over the appropriate roles of church and state learned during one's school years may never be corrected." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 978.

This message is not constitutionally mandated, and it is erroneous in fact. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. at 313. The School District's neutral policy of equal access represents a sound accommodation of the interests of a religious people within the framework of the First Amendment, and as such it should have been sustained.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1982.

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 80-2384

LUBBOCK CIVIL LIBERTIES UNION,
Plaintiff-Appellant,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellees.

March 11, 1982

Before POLITZ and RANDALL, Circuit Judges, and GORDON*, District Judge.

RANDALL, Circuit Judge:

The Lubbock Civil Liberties Union (LCLU) appeals from a decision of the trial court in its suit brought under 42 U.S.C. §§ 1983 and 1988 for declaratory and injunctive relief, damages and attorneys fees against the Lubbock Independent School District (the District) and several individual defendants. The LCLU alleged various practices and policies of the District constituted an impermissible establishment of religion in violation of the first and fourteenth amendments to the Constitution.

For the reasons set forth below we reverse the judgment of the trial court as to the constitutionality of the current policy.

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* *District Judge of the Eastern District of Louisiana sitting by designation. Judge Gordon concurred in the above opinion before his death March 4, 1982.

I. Facts.

In September, 1979, the LCLU filed suit seeking an end to various practices in the District which it contended were unconstitutional violations of the establishment clause of the first amendment.[1] Included in these practices were morning Bible readings over school public address systems, classroom prayers led by teachers, a period of silent prayer ended by "Amen" over school public address systems and distribution of "Gideon" Bibles to fifth and sixth grade students.

These allegedly unconstitutional practices had occurred for almost ten years prior to the filing of the suit, and were traced to at least 1971, when the record indicates that several complaints were made to the District concerning the presentation of school assemblies "of a Protestant Christian evangelical variety." An attorney for the LCLU discussed the complaint with the District at that time. As a result a policy relating to religious activities was formulated and is apparently reflected in a letter, dated May 3, 1971, from the District's counsel to the attorney for the LCLU.[2] The policy reflected in the letter

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[1] The first amendment states in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, ...

U.S. Const., amend I.

[2] The letter stated in pertinent part:

> Since our conversation with you, Tom Griffith and Reverend Higgins, of some two weeks ago, we have gone over the matters discussed with Mr. Ed Irons, Superintendent of Schools. He advised us on Thursday of last week that he has had a staff meeting with all school principals and has stressed the school policy that there must be strict neutrality of all personnel regarding religious activities. Teachers are instructed not to encourage any particular religious activity.
>
> There are to be no speakers on religion at any assembly.
>
> The practice heretofore employed by the Gideon Society in placing new testaments in the hands of students is to be discontinued.

called for neutrality of all personnel regarding religious activities, a prohibition against the encouragement of any particular religious activity, the prohibition of any speakers on religion in any assembly, and the discontinuance of what apparently had been a practice of the Gideon Camp's "placing New Testaments in the hands of students." Additionally, the District agreed that prayers given over school public address systems would be stopped, although the letter advised that its recipients should "not be misled" into believing that the District was prohibiting "open prayer."

The evidence adduced at trial, uncontroverted by the District, indicated that the practices complained of in 1971 continued unabated after the "adoption" of the "policy" in 1971. The District wholly failed to discontinue loud speaker prayer and Bible readings in the schools, continued to have assemblies with evangelistic speakers and continued the distribution of the Gideon Bibles.[3]

In January, 1979, after further complaints were received in December, 1978 from patrons of the District, the District

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Each individual student will be permitted to pray, if he so desires, as his own religion dictates—preferably by silent prayer. It is our feeling that the instructions given by Superintendent Irons bring the School District in compliance with court decisions.

You are not to be mislead [sic] by this letter into believing that the School District is prohibiting open prayer.

[3] The District, at trial, alleged that the Bible distribution policy had changed because, after 1971, the Gideons no longer placed the Bibles into the children's hands but merely put the Bibles on tables in an area of the school to facilitate distribution. The students were called by class to voluntarily pick up the Bibles under the watchful eyes of Gideons who had brought the Bibles to the school. This mere change in method does not, as found by the trial court, clothe the activity in constitutionality.

The Gideon Camp ceased distribution of the Bibles some time after October, 1979, because of complaints they had received.

Board of Trustees, statutorily authorized to make rules and regulations for the District,[4] authorized the first written "policy" on religious activities in the District.[5] This policy was followed by the adoption, in April, 1979, of procedures to implement the policy.[6]

The adoption of the January, 1979 policy did not, however, stem the allegedly unconstitutional Bible reading, religious assemblies, and daily prayers. To the contrary, the District apparently had no intention of altering the practices about

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[4] Section 23.26 of the Texas Education Code states:

> (a) The trustees shall constitute a body corporate and in the name of the school district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.
>
> (b) The trustees shall have the exclusive power to manage and govern the public free schools of the district.
>
> (c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office.
>
> (d) The trustees may adopt such rules, regulations, and bylaws as they may deem proper.

Tex.Ed.Code Ann. § 23.26 (Vernon).

[5] The policy reads as follows:

> Insofar as religion is concerned, the Lubbock Independent School District adheres to the principle of freedom of religion as expressed in the Constitution of the United States and the Constitution of the State of Texas.

[6] The procedures adopted are as follows:

> No school employee shall compose, prescribe, or place his/her approval upon any particular prayer or form of religious activity; however, student initiated and directed religious activities will be permitted.
>
> The Lubbock Independent School District will allow the teaching about religion through study of the Bible for its literary and historic qualities, or of religion, when presented objectively as part of a secular program of education.

which the LCLU had complained as early as 1971 but rather instructed that the practices should be student rather than teacher initiated. The desire to maintain the status quo is, in fact, clearly reflected in the minutes of the meetings of the Board of Trustees.

> In its meeting on January 25, the Board adopted a broad policy regarding religion in the schools, and the administration was instructed to develop procedures and guidelines to implement the policy. These procedures were adopted by the Board on April 19. The procedure provides that we allow student initiated religious activities. *Basically, this will fairly well continue following our present practice.* You should make the staff aware that we are to comply with the student-centered activity. This provision applies even in the classroom, and teachers are not to promote or initiate the activities. We have the responsibility to provide alternate activities for students who have objections to taking part in any of these programs that we may have.

(emphasis added). The policies and practices complained of continued unabated in the schools and were amply documented in surveys taken by the District in October, 1979. The District does not dispute on appeal that, even after the adoption of the January, 1979 policy, the practices engaged in by the district "fell short of constitutional standards."

In September, 1979, the LCLU filed suit against the District. The case proceeded through discovery toward trial. In August, 1980, after receipt of the pretrial order and docketing of the case for trial, the District radically altered its religious practices policy. A new and detailed policy was approved by the Board of Trustees.[7] The LCLU, contending that adoption of the new policy did not render moot the question of the prior

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[7] The new policy stated:

> Wishing not to infringe either upon the belief of any student in a Supreme Being or upon the right of any student not to believe, The School Board places in effect the following policies relating

practices and alleging that the adoption of the policy was no indication that the District would discontinue its former practices, proceeded to trial, requesting a declaratory judgment that the prior practices had been unconstitutional and injunctive relief to enjoin continuation of those practices.

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to religion in the schools which supercede the policy on religion adopted on January 25, 1979.

1. The School Board permits the teaching of religion when presented objectively as part of a secular program of education.

2. The School Board permits study of the Bible and other religious materials for their literary and historic qualities.

3. Other than as stated in Sections 1. and 2. above, the School Board does not permit prayer or reading passages from religious materials aloud or over the loudspeakers during class hours or at functions which students are required to attend.

a. Except as limited above, this policy permits any student to pray in the school silently or audibly when it is not disruptive.

b. School administrators may set aside a short period for silent thought or meditation by students during the school day.

c. This policy permits teachers to explain the background or significance of religious content and beliefs where appropriate to the subject matter they are teaching.

d. This policy permits both teachers and students to recognize, reiterate or read aloud or over the loudspeakers historical documents or portions thereof or statements from recognized figures, even though such statements include personal religious beliefs.

4. The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

5. Religious literature other than necessary for classroom work shall not be disseminated during class hours but may be

The LCLU also challenged the new August, 1980 policy, particularly Paragraph 4 of the policy which states:

> The school board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

The LCLU claimed that this part of the newly devised policy was unconstitutional.

The case was tried to the court. There was abundant evidence to substantiate the LCLU claims of prior unconstitutional practices by the district. There was, however, less evidence introduced concerning the meaning and operation of the new policy, specifically Paragraph 4, adopted shortly before trial commenced.

The trial court determined at the close of evidence that the District practices cited above under both the unofficial policy prior to 1979 and the first written policy of January, 1979 infringed on the first amendment rights of students. The trial court, however, also determined that the newly adopted August, 1980 policy on religious practices was not facially unconstitutional. The court specifically noted that Paragraph 4 was

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purchased, indexed, shelved and circulated as library material.

a. This policy permits one student to offer religious literature to another student on a private non-intrusive, non-disruptive basis.

b. This policy permits volunteer groups of students to disseminate religious literature on a non-disruptive basis to the members of the group.

c. This policy permits any teacher to use historical documents or patriotic materials in the classroom where appropriate to the subject matter being taught.

6. There shall be no religious tests required of applicants for employment.

not unconstitutional as it permitted student groups of all types to gather at the school as long as attendance at meetings was voluntary. According to the court, there was undisputed testimony that there would be no extra expense accruing to the district resulting from the meetings before or after school, and in the event that such an expense was incurred, the group using the facility would be required to pay.

Additionally, the trial court found that no injunctive relief was necessary to correct any past unconstitutional practices or to insure future adherence to the August, 1980 policy that it had determined to be constitutional. The court stated that the passage of the new policy effectively wiped out any threat of harm from past violations. Secondly, the court found that the district had acted in good faith in establishing the new policy and that there was no need to enjoin the district to affirmatively carry out this new policy.

Finally, the trial court held that the LCLU did not have standing to bring an action for actual damages and that only nominal damages would be awarded, finding no evidence of knowledgeable ill-will that would form a basis for exemplary or punitive damages. The court did award reasonable attorneys fees and costs to the LCLU.

The LCLU challenges that portion of the trial court's judgment wherein the court refused to declare Paragraph 4 unconstitutional. It also challenges the trial court's refusal to enjoin the District from continuing past practices and current unconstitutional practices under Paragraph 4. We address each argument in turn.

II. The Establishment Clause Violation.

A. Conceptual Framework For Analysis of an Establishment Clause Violation.

The first amendment which prohibits any law respecting an establishment of religion also prohibits laws which prevent the free exercise thereof. In the case before us, the LCLU con-

tends the District has, through its adoption of Paragraph 4, violated the establishment clause. The District defends on the basis that its action simply conforms to the right of students to freely exercise their religion in a public forum. We are thus faced with the classic first amendment confrontation.

This scenario in the first amendment area is not new. The United States Supreme Court has many times been called upon to determine whether or not a particular practice or policy of the state violated the first amendment,[8] or whether the prohibition of a particular policy or practice was in fact a prohibition on an individual's free exercise of religion.[9] Many of these cases have arisen from policies or practices carried out by public schools or by state financed education agencies.[10] In its examination of claimed establishment clause violations or impermissible burdens on free exercise, the Court has articulated the concerns which underlie its first amendment decisions and has developed a methodology to determine whether an establishment clause violation exists. Although neither the Supreme Court nor the appellate courts have addressed precisely the question before us today, a review of the underlying concerns and application of the methodology established for examination of first amendment violations provide a conceptual framework in which we may examine the District's policy on supervised student religious meetings.

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[8] *See, e.g., McGowan* v. *Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (Sunday closing laws held constitutional in face of establishment clause attack).

[9] "Free exercise" cases include *Sherbert* v. *Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (requirement of eligibility for unemployment compensation of willingness to work on Saturday violated free exercise rights of those who were religiously opposed to work on Saturday, not Sunday).

[10] Cases relating to the public schools and thus particularly relevant to our discussion today are set forth at text, pp. 1043, 1044.

In the Supreme Court's first modern encounter with the establishment clause, the Court applied the first amendment to the states through the fourteenth amendment. *Everson* v. *Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). Additionally, it set forth the guiding principle of religious neutrality which has changed little in first amendment jurisprudence:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

330 U.S. at 15-16, 67 S.Ct. at 511 (citation omitted).[11]

This concern for "religious neutrality" was, according to Justice Frankfurter, particularly important in the setting of the public school.

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing,

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[11] See L. Tribe, *American Constitutional Law*, § 14-4 at 816-17 (1978); Note, Government Neutrality and Separation of Church and State: Tuition Tax Credits, 92 Harv.L.Rev. 696, 697-700 (1979).

> not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203, 231, 68 S.Ct. 461, 475, 92 L.Ed. 649 (1948).

Moreover, as the Court of Appeals for the Second Circuit has stated:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. *See Roemer* v. *Board of Public Works* [426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179], *supra; Chess* v. *Widmar*, *supra*, 635 F.2d 1310; Tribe, *supra* § 14-5 at 825.

Brandon v. *Board of Education of Guilderland Central School District*, 635 F.2d 971, 978 (2nd Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981). *See also Widmar* v. *Vincent*, ___ U.S. ___, ___ n.13, 102 S.Ct. 269, 276, 70 L.Ed.2d 440 (1981).

As a result of this special concern for the religious neutrality of our educational system, many religious activities occurring in school facilities during school hours have been declared unconstitutional. *Stone* v. *Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980) (posting of Ten Commandments in Kentucky public schools unconstitutional); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (daily reading of Bible verses and Lord's Prayer in public schools held unconstitutional); *Engel* v. *Vitale*, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (state composed and mandated prayer to be recited in public schools held unconstitutional); *McCollum* v. *Board of Education*, *su-*

pra (religious instruction in public school facilities on school time at no cost to district held unconstitutional); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, ____ U.S. ____, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982) (statute authorizing voluntary student or teacher initiated prayer at the beginning of the school day unconstitutional); *Brandon* v. *Board of Education of Guilderland Central School District*, *supra* (school's refusal to allow students to meet for prayer meetings before or after school not unconstitutional as violative of the free exercise clause).

However, in some cases, activity which arguably implicated the first amendment's prohibition of the establishment of religion has been upheld. *Zorach* v. *Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (released time for public school students to attend religious classes off campus held constitutional); *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987, 101 S.Ct. 409, 66 L.Ed.2d 251 (1980) (upholding rules permitting public school Christmas observances with religious elements as promoting an articulated secular purpose).

Considering the concern for religious neutrality in the public school setting, the question becomes how to determine whether a school has impermissibly participated in an establishment of religion. While each policy or practice must be examined on its own facts, the Supreme Court has established a method of analysis to be used to answer the question. This analysis asks three questions: does the policy or practice have a secular (non-religious) purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy or practice avoid an excessive entanglement with religion? *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). If the answer to *all three* questions is in the affirmative, the policy or practice does not impermissibly provide for an establishment of religion and is thus constitutional. Ideally, too, affirmative answers to the above questions will alleviate the special concern that the public schools, important as "the most pervasive

means for promoting our common destiny," are being utilized to promote an establishment of religion.

B. Application of the Analytical Framework to the Case Before Us.

1. Secular Purpose.

The District states that the avowed purpose of Paragraph 4 is to "encourage the development of leadership, communicative skills, and social and cultural awareness by allowing the voluntary association of students for educational, moral, religious, or ethical purposes." This association, according to the District,

> would simply permit students to put their ideas and practices in competition with the ideas and practices of other groups, religious or secular, which would stimulate students' intellectual curiosity and enhance their educational experience.

At least one court has recognized that "[a] neutral policy granting all student groups, including religious organizations, access to school facilities reflects the secular, and clearly permissible purpose—the encouragement of extra-curricular activities." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 978. If the policy before us was merely a neutral policy contained in a neutral section of the District rules and regulations, our examination might be less difficult. Paragraph 4 must, however, be analyzed in the context in which it is written. It appears in the middle of a policy concerned with religious activities in the schools. The preamble to the policy[12] is obviously concerned with religious beliefs and the place of *religion* in the public schools. The language of the paragraph itself, stating that students may gather "on the same basis as other groups" indicates that the *focus* of this paragraph is with students who wish to meet for educational,

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[12] See note 7, *supra*.

religious, moral and ethical purposes. Thus, it is conceivable that the "pre-eminent purpose," *Stone* v. *Graham*, 449 U.S. at 41, 101 S.Ct. at 194, for Paragraph 4 is to promote meetings of a religious nature.[13] However,

> [e]ven if the avowed objective of the [District] is not itself strictly religious, it is sought to be achieved . . . [by religious meetings]. The unmistakable message of the Supreme Court's teachings is that the State cannot employ a religious means to serve otherwise legitimate secular interests. *See Schempp*, 374 U.S. at 224 [83 S.Ct. at 1572].

Karen B. v. *Treen*, 653 F.2d at 901. Thus, the purpose of this policy, ostensibly devised to allow many groups to meet, is, when examined in the context of the total school policy, more clearly designed to allow the meetings of religious groups. The District's justification for the religious meetings, the development of leadership and communicative skills, cannot withstand scrutiny when those goals can be attained through non-religious student associations.

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[13] Our review is made more difficult by the lack of data put before the trial court and thus before this court on appeal as to the meaning and operation of Paragraph 4. A review of the policy on its face, however, is enough to convince us there was no "pre-eminent" secular purpose. *See Stone* v. *Graham*, 449 U.S. at 40, 101 S.Ct. at 193.

Additionally, while the District in its brief on appeal claims that the purpose of the policy was to enhance student leadership potential and provide for situations where students gather to discuss varying ideas, there was actually nothing in the record, such as testimony from school board members or school authorities, which would indicate a secular purpose. Although we recognize that a secular purpose which is simply stated by a challenged school district will not necessarily be sufficient to avoid conflict with the first amendment, *Stone* v. *Graham*, 449 U.S. at 40, 101 S.Ct. at 193, *Karen B.* v. *Treen*, 653 F.2d at 900, articulation of a secular purpose by one who participated in the decision making process leading to the adoption of the policy would be helpful for any trial or appellate review of the policy. Again, the record is sadly lacking.

2. Primary Effect of the Policy.

The crucial inquiry in determining the primary effect of Paragraph 4 is not whether an incidental benefit[14] accrues to a religious institution as a consequence of the District's action, but whether Paragraph 4 advances religion. *See Tilton* v. *Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). The primary effect test necessarily inquires whether the consequence of the district's policy is to place its imprimatur upon religious activity.[15] *School District of Abington Township* v. *Schempp*, 374 U.S. at 216-19, 83 S.Ct. at 1568-69.

In the case before us, the articulated policy of allowing religious meetings at a time closely associated with the beginning or end of the school day implies recognition of religious activities and meetings as an integral part of the District's extracurricular program and carries with it an implicit approval by school officials of those programs. This, in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings,

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[14] The District argues that any benefit would accrue only incidentally. We find this argument in the context of what has been determined to be "incidental benefits" to be unpersuasive. An incidental benefit accrues only when the primary benefit is secular; for example, loan of textbooks by the state to a parochial school incidentally benefits religion in the context of a primary benefit of secular texts being used by all children. *Board of Education* v. *Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). The allowance of religious meetings by the District here can in no way be considered an incidental benefit to religion. The benefit here accrues to religion, not to permissible secular goals.

[15] The District argues that no *particular* religion is advanced. That is not the question. The question is whether religion is advanced. *Everson* v. *Board of Education*, 330 U.S. at 15-16, 67 S.Ct. at 511.

renders the primary effect of the policy impermissible advancement of religion. We reiterate from *Brandon:*

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. *To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.* See *Roemer* v. *Board of Public Works, supra,* 426 U.S. at 750, 754 [96 S.Ct. 2337, 2346] (1976); *Abington, supra; Engel, supra; Tribe, supra* § 14-5 at 825.

Brandon v. *Board of Education of the Guilderland Central School District,* 635 F.2d at 978 (emphasis added). *See also, Widmar* v. *Vincent,* ___ U.S. at ___ n.13, 102 S.Ct. at 276 ("University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion. *See Tilton* v. *Richardson,* 403 U.S. 672, 685-686, 1971 [91 S.Ct. 2091, 2099, 29 L.Ed.2d 790].").

In light of the District's desire to continue religious activities, evident from the August, 1980 policy, its argument that there is no imprimatur or implied approval by the District of voluntary meetings simply because the meetings take place after "regular hours" is belied by the context of its policy, which authorizes supervised student meetings at a time closely associated with the school day.

The District contends, however, that the critical factor in the determination of the primary effect of this policy is whether there is coercion inherent in the policy, i.e., whether students are forced, by peer pressure or otherwise, to attend the religious activity which violates their first amendment rights. The district claims that since there is no coercion in this case, the meetings being voluntary, Paragraph 4 does not advance religion. This contention finds no support in case law.

> State and school officials point out that student participation in the daily prayer session is allowed to be

> wholly voluntary. This fact is not relevant to the Establishment Clause inquiry. As the Supreme Court said in *Engel*, "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ." 370 U.S. at 430, 82 S.Ct. at 1266-67, 8 L.Ed.2d 607. The Court then reiterated this principle in *Schempp*, stating that the constitutional defect of the religious exercises involved was not "mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause." 374 U.S. at 224-25, 83 S.Ct. at 1573, 10 L.Ed.2d at 859. The result is the same even though Jefferson Parish students must affirmatively request to participate in the prayer observance, for an Establishment Clause violation does not depend upon the presence of actual governmental coercion. *See Schempp*, 374 U.S. at 223, 83 S.Ct. at 1572, 10 L.Ed.2d at 858; *Engel*, 370 U.S. at 430, 82 S.Ct. at 1267, 8 L.Ed.2d at 607.

Karen B. v. *Treen*, 653 F.2d at 902.

The District also places great emphasis on its contention that the meetings take place before or after "regular hours," and claims that meetings must take place before or after school buses run. This, claims the District, distinguishes the case from *Brandon* and *Karen B.* where activities were held after buses had arrived at school *(Brandon)* and after the school day had begun *(Karen B.)*. The District claims that the compulsory education machinery is not involved; thus there is no advancement of religion. We find, however, that it is the Texas compulsory education machinery that draws the students to school and provides any audience at all for the religious activities, whether the buses have run or the school day has "officially" begun. The distinctions drawn by the District to support its claim of no advancement do not withstand scrutiny. Rather, the critical factors are the District's use of its compulsory education machinery, which provides students available to attend even voluntary meetings, and its implicit support and approval of the religious meetings. *See Brandon* v. *Board of*

Education of Guilderland Central School District, 635 F.2d at 978.

An examination of Paragraph 4 in the context of the overall policy of which it is an integral part demonstrates that its authorization of voluntary meetings held before or after school (whether or not the buses have run) has the primary effect of advancing religion. As the Second Circuit stated in *Brandon:*

> An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school. *O'Hair* v. *Andrus*, 613 F.2d 931, 936 (D.C.Cir.1979) (Leventhal, J.). Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected.

Id.

3. Entanglement With Religion.

"The entanglement analysis focuses on procedural questions. *Roemer* v. *Board of Public Works*, 426 U.S. at 755 [96 S.Ct. at 2349]," and, "if the state must engage in continuing administrative supervision of nonsecular activity church and state are excessively intertwined." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 979. Here the District admitted, prior to trial, that, in compliance with Texas state law, it would exercise supervision over the students:[16]

> It has been the consistent policy of the Board of Trustees of Lubbock Independent School District in connection with their statutory responsibilities with regard to school

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[16] In its appellate brief, the District reversed its earlier pre-trial position, alleging, on appeal, that supervision would be accomplished by a non-school person acceptable to the District. We believe its first position to be more in keeping with the law and actual practice. Furthermore, a non-school employee who must be approved by the

> properties *to furnish personnel of the school district* for protection of such properties. This is done whether the group is putting on a theatrical performance, a political debate or other activity for which the premises are let.
>
> Section 23.26 of the Texas Education Code expressly sets out that property of the district whether real or personal is vested in the trustees and it necessarily follows that the trustees are responsible for such property.

Trial Brief of District 3 (emphasis added).

This admitted supervision is precisely the type of entanglement struck down in *Brandon* and *Karen B.* as impermissible entanglement.

> School officials in this case would be forced to monitor the activities of the "Students for Voluntary Prayer." . . . More importantly, surveillance will be required to guarantee that participation in the prayer meetings would always remain voluntary.[9]
>
> While the outcome of the case was questionable even in 1965, the Supreme Court's adoption of the entanglement test in 1969, *Walz* v. *Tax Commission, supra*, 397 U.S. [664] at 674, 90 S.Ct. [1409] at 1414, [25 L.Ed.2d 697] seriously undercuts the holding. The faculty supervision authorized by the court's decision is indicative of continuing surveillance of the students' prayer sessions that would have been necessary to assure that no coercion resulted.

[9] In *Reed* v. *Van Hoven*, 237 F.Supp. 48 (W.D.Mich.1965), the court authorized a school to permit student-initiated voluntary prayer at the commencement of the school day. Teacher supervision was permitted to maintain order at the prayer sessions. The court suggested that no bell signifying the start of the prayer exercise would be rung and that there should be a general commingling of the entire student body on the way to class.

District also indicates entanglement when accompanied by use of school facilities. *McCollum* v. *Board of Education*, 333 U.S. at 208, 68 S.Ct. at 464.

Brandon v. *Board of Education of Guilderland Central School District*, 635 F.2d at 979. *See Karen B.* v. *Treen*, 653 F.2d at 902.

Additionally, the District's position that no District funds are required or spent because of meetings held pursuant to the policy does not free it from entanglement. *See McCollum* v. *Board of Education*, 333 U.S. at 208, 68 S.Ct. at 464 (classes in religion held on school premises during school hours at no cost to district held unconstitutional). Here, the use of the District's facilities and its continuing supervision of the religious meetings create the entanglement which leads to an impermissible establishment of religion.

C. Defenses Raised by the District.

The District argues that Paragraph 4 is necessary to avoid violation of the free exercise clause. This defense is insupportable in law and in fact.

Paragraph 4 is in no way mandated by the free exercise clause. A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion. *See* L. Tribe, Constitutional Law, § 14-8 (1978). *See also Abington School District* v. *Schempp*, 374 U.S. at 223, 82 S.Ct. at 1572; *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 977. Here, there is no problem with students being foreclosed from practicing religion. The students attend school only several hours a day, five days a week, nine months during the year. The other hours are effectively open for their attendance at religious activities at places other than state supported schools.

The District also argues that the school is a public forum, relying on *Widmar* v. *Vincent*, *supra*,[17] maintaining that it

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[17] As the Supreme Court itself stated, while a university is a public forum, this is no indication that a public school is. *Widmar* v. *Vincent*, ___ U.S. at ___ n.12, 102 S.Ct. at 275.

created a public forum when it allowed many student groups to meet before or after school. This reliance is misplaced. The District's argument misapprehends the definition of public forum. The holding of student meetings at a *public* school does not turn that school into a public forum. *See Brandon* v. *Board of Education of Guilderland Central School District, supra; Widmar* v. *Vincent, supra.* This public forum argument was, in fact, explicitly rejected in *Brandon:*

> First, a high school is not a "public forum" where religious views can be freely aired. The expression of religious points of view, and even the performance of religious rituals, is permissible in parks and streets when subject to reasonable time, place, and manner regulations. *Niemotko* v. *Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); *Kunz* v. *New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *O'Hair* v. *Andrus, supra* [613 F.2d 931 (D.C.Cir. 1979)]. The facilities of a university have also been identified as a "public forum," where religious speech and association cannot be prohibited. *Chess* v. *Widmar, supra*, 635 F.2d 1310; *Keegan* v. *University of Delaware, supra* [*Keegan* v. *University of Delaware*, 349 A.2d 14 (Del.1975)]. A high school classroom, however, is different, *Chess* v. *Widmar, supra*, slip op. at 22-23. While students have First Amendment rights to political speech in public schools. *Tinker, supra*, [*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731] sensitive Establishment Clause considerations limit their right to air religious doctrines.

Brandon v. *Board of Education of Guilderland Central School District*, 635 F.2d at 980.

In summary, we find a difficult situation confronting this court, one which apparently has never been directly addressed by an appellate court before. We are faced with an explicit authorization of religious meetings contained in the context of a policy setting forth guidelines on religion in the school. Additionally, the school implicitly uses the compulsory education laws to provide the students and explicitly agrees to provide supervision for the meetings. Our examination of Par-

agraph 4 according to the purpose, effect and entanglement analysis articulated by the Supreme Court indicates that, as to all three questions, impermissible establishment of religion exists.

III. Claims For Injunctive Relief.

The LCLU alleges that it was entitled to relief enjoining the District from what it claimed would be continuation of the practices declared unconstitutional as well as to the declaratory judgment that the practices prior to August 26, 1980 were unconstitutional, claiming that the District's past record of unconstitutional practices presented an imminent threat of future constitutional violations.

The standard to be applied by this court in reviewing a denial of an injunction is whether the trial court abused its discretion in the denial. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). We find no abuse of discretion here.

The LCLU alleges that because the District maintained its unconstitutional practices through the 1979-80 school year despite complaints of illegality, it is likely that future violations will occur; thus an injunction must issue. It argues that actions of the District have been taken in bad faith and that there is no real intent to enforce the new policy.

However, the trial court found, and the finding is not clearly erroneous, that the past practices it declared unconstitutional had ceased, that no complaints had been received about the new policy and that the school district would make a good faith effort to enforce this new, and in the trial court's view, constitutional policy. We will not replace our judgment for that of the trial court when, in this case, the trial court has been granted broad discretion, 345 U.S. at 633, 73 S.Ct. at 897, to make a decision based on its evaluation of the evidence.

Our refusal to reverse the trial court is further supported by *Meltzer* v. *Board of Public Instruction of Orange County*,

Florida, 548 F.2d 559 (5th Cir. 1977), *aff'd on rehearing*, 577 F.2d 311 (1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 872, 59 L.Ed.2d 56 (1979), in which this court refused to grant injunctive relief against discontinued unconstitutional practices of a school district. The trial court there was faced with a school district which had *very reluctantly* complied with constitutional standards. *Id.* at 562-65. The *Meltzer* court's reluctance to overturn the decision of the trial court denying injunctive relief, *id.* at 568, even in the face of a recalcitrant school district provides persuasive guidance for us. While we agree that the practices of the District prior to August, 1980 were clearly unconstitutional, we do not agree that the trial court's determination that the practices were not likely to continue and refusal of an injunction as to the practices were an abuse of discretion.

We affirm the judgment of the district court refusing to enter an injunction with respect to the practices in effect before August 26, 1980. We reverse the judgment of the district court insofar as it held that Paragraph 4 was constitutional. We remand to the district court for the entry of an award of appropriate attorneys fees to the LCLU for this appeal. The costs of this appeal will be borne by the District.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Civil Action No. CA-5-79 119

LUBBOCK CIVIL LIBERTIES UNION,
Plaintiff,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

MEMORANDUM OPINION

Plaintiff brings this civil rights action seeking declaratory, injunctive, and compensatory relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201-02 against the defendant School District, its Board of Trustees, and its Superintendent. Plaintiff complains of violations by the defendants of the free exercise and establishment clauses of the First Amendment to the United States Constitution. Although violations of other provisions of the Constitution were alleged, the trial focused primarily on First Amendment infringements.

This Court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. §§ 1331 and 1343.

The case was tried before the court on the 10th and 11th days of November, 1980 with all attorneys and parties present, and after hearing and considering the evidence, the pleadings, and the briefs and arguments of counsel, the court enters this memorandum opinion which shall constitute the court's findings of fact and conclusions of law.

STANDING

Plaintiff Lubbock Civil Liberties Union (LCLU) brings this suit in a representative capacity as a voluntary association composed primarily of residents of and taxpayers to the Lubbock Independent School District. Some members have children who are presently attending or will attend public schools in the district, but it is conceded that LCLU is the sole plaintiff and no private individuals are pursuing damages in any form. Defendants agree that the plaintiff can sue as the representative of its members for a declaratory judgment or an injunction; however, Defendants oppose LCLU's right to bring an action for damages.

The Supreme Court has specifically recognized that associations have standing when seeking a declaration, injunction, or other form of prospective relief. *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975). However, in the *Warth* case, the High Court refused to allow an association to sue for monetary damages on behalf of its members when it was acting only in a representative capacity. The reasoning was that any injury which was suffered was peculiar to the individual member concerned and individualistic proof would be required.

In the present case, it appears that members of LCLU would have claims of varying degree. For instance, some members have children in public school at the present time, and some only expect to have children enrolled in public school in the future. The evidence also indicates that a few schools have not participated in the alleged unconstitutional practices such as prayer reading. These combined factors demonstrate a need for each individually injured member of the LCLU to prove an appropriate monetary award.

Therefore, plaintiff cannot properly represent its members in a claim for compensatory damages and lacks standing to obtain such relief. Plaintiff does have standing to sue for declaratory and injunctive remedies.

Even if members of the LCLU had common claims of equal status such that plaintiff would have the proper standing, plaintiff would still only be entitled to nominal damages not to exceed one dollar ($1). *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Familias Unidas* v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980). Compensatory damages under 42 U.S.C. § 1983 are granted only upon proof of actual injury although denial of the absolute right to procedural due process warrants the nominal award. *Carey*, *supra* at 266-67. This rationale similarly applies to an infringement of the First Amendment. *Familias Unidas*, *supra* at 402. As this opinion will further discuss, plaintiff has not shown compensable injury but has demonstrated an unconstitutional violation of the First Amendment that entitles it to nominal damages.

SCHOOL POLICY PRIOR TO JANUARY 25, 1979

The defendant School District and its Board of Trustees do not appear to have adopted a written policy concerning the participation of the School District and its Trustees, administrators, and teachers in religious practices in the school system prior to January 25, 1979. However, the policies, while in most instances unwritten, were summarized in Plaintiff's Exhibit 5, which is a letter from the attorney for the School Board to a local attorney and which is dated May 3, 1971. This policy seemed to advocate strict neutrality of all personnel regarding religious activities in the school and specifically prohibited any speakers on religion in any assembly. Further, teachers were instructed not to encourage any particular religious activity; however, the letter clearly indicated a policy which would allow individual students to engage in prayer—preferably by silent prayer. This letter also referred to the practice of Gideon New Testament distributions in the schools. The letter stated that the practice of placing these New Testaments "in the hands" of students was to be discontinued. Defendants rely on a perfectly literal construction of this portion of the letter and contend that they only intended to discontinue having a member of the Society actually "hand" such a New Testament to a

student. Instead the school would allow the Gideons to set up a central Bible distribution point in the school where fifth and sixth grade students could come to pick up a copy if they so desired, and this was the practice actually followed. While strict neutrality was the stated goal under this policy, the constitutionality can only be measured by looking at the actual performance under this policy. As will be hereinafter discussed, the policy in effect prior to January 25, 1979, as evidenced by Plaintiff's Exhibit 5, was not carried into practice and the evidence shows that those acting on behalf of the School District exceeded the bounds of constitutionality.

JANUARY 25, 1979 POLICY

The Board of Trustees of the Lubbock Independent School District passed the first written policy regarding religion and prayer in the Lubbock Independent School District on January 25, 1979 (Defendant's Exhibit D-13) after receiving various complaints about religious activities in the schools. This policy affirmed the District's adherence to the principles of freedom of religion as expressed by the Constitutions of the United States and of the State of Texas. Thereafter, on April 19, 1979, the Board of Trustees adopted certain guidelines for implementing this policy which enjoined any school employee from approving or prescribing any particular prayer or form of religious activity. These guidelines expressly permitted student initiated and directed religious activities and further permitted the teaching of religion and the study of the Bible for its literary and historical qualities or of religion, when presented objectively as a part of the secular program of education. Except for the clause that "student initiated and directed religious activities will be permitted," the expressed school policy would seem unobjectionable. However, once again the implementation of this policy fell short of Constitutional standards, but the court does not pass on the constitutionality of the policy itself.

PRACTICES AND PROCEDURES BY THE DEFENDANT SCHOOL DISTRICT AND ITS TEACHERS

The court finds that there have been acts under both the unwritten policy and the first written policy of January 25, 1979 that infringed on the First Amendment rights of students. The court finds that the following practices were stipulated to and that these practices and acts were violative of the First Amendment.

(1) Reading passages from the Bible over the public address system;

(2) Reading religious inspirational passages for thought for the day over the public address system;

(3) A period of silent meditation ended with "Amen" over the public address system;

(4) Students reciting prayers into the school's public address system;

(5) Gideon Bibles were distributed to fifth and sixth grade students within Lubbock Independent School District for more than ten years past, pursuant to written school policy, but this practice was stopped during 1979 by the Gideons after some complaints were received from citizens.

In addition to the above, the testimony of students subjected to these practices showed that one or more religious programs were permitted before assemblies in both senior and junior high schools. Although this court finds, from the testimony of the school officials, that a good faith attempt was made to screen these programs in order that religious messages would not be delivered to the students at assemblies, it was established that such programs did involve a very definite message of a religious nature.

The students further testified that they found these assemblies and the practice of prayer being offered over the loudspeaker systems and the distribution of New Testament Bibles offensive to their particular religious beliefs. The evidence also established that these students were subjected to school disciplinary procedures during the times of these assemblies and

morning devotionals and were not given the opportunity to excuse themselves from such activities to go to a place where they would not be forced to participate. In fact, the testimony was that any protest by a student was to no avail and often resulted in ridicule or scorn from the peers of these students, or by the lack of any effective corrective action when brought to the attention of teachers.

Although defendants claim that these activities were student initiated and student directed, the fact is that the ultimate control remained in the school because, as admitted by one witness, the school could exercise its judgment in preventing any "unreasonable" religious practice. A school system cannot escape its responsibility for the protection of its students' First Amendment rights by granting to other students the right to initiate and direct religious programs to which non-consenting students are subjected. These programs and prayer periods were during regular school hours and on the school premises and students were in effect forced, by school discipline or peer pressure, to be present during these religious exercises.

Therefore, this court finds that such acts and conduct by the defendants were unconstitutional, and though they have been discontinued, the discontinuance does not remove the fact that they were unconstitutional and that students were deprived of First Amendment rights. Specifically, the policy permitting daily prayers of devotionals over the public address system is violative of the First Amendment's Establishment Clause as applied to the states through the Fourteenth Amendment. *See School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Meltzer* v. *Board of Public Instruction of Orange County, Fla.*, 548 F.2d 559, rehearing 577 F.2d 311, *cert. denied* 439 U.S. 1089, 99 S.Ct. 872. This same rule and rationale would apply to the assembly situation in which the students were in effect a "captive audience" for religious presentations. Further, the practice of Gideon Bible distribution creates an unconstitutional preference. *See Tudor* v. *Board of Education*, 100 A.2d 857, *cert. denied*, 348 U.S. 816 (1975); *Meltzer, supra*, at 574. By permitting this distribution,

the school board would appear to be placing its stamp of approval upon the Gideon version of the Bible thereby preferring one religion over another. Therefore, although the school board stated a policy of strict neutrality concerning religious activities in the schools, the actual practices under these policies proved unconstitutional.

THE AUGUST 26, 1980 POLICY

The defendants apparently recognized the shortcomings of the January 25th policy in light of continuing religious practices in the schools after its passage. On August 26, 1980, the School Board adopted a new policy with respect to religious exercises[1] and thereby prohibited activities such as the recita-

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[1] "Wishing not to infringe either upon the belief of any student in a Supreme Being or upon the right of any student not to believe, the School Board places in effect the following policies relating to religion in the schools which supersede the policy on religion adopted on January 25, 1979.

1. The School Board permits the teaching of religion when presented objectively as part of a secular program of education.

2. The School Board permits study of the Bible and other religious materials for their literary and historic qualities.

3. Other than as stated in Sections 1. and 2. above, the School Board does not permit prayer or reading passages from religious materials aloud or over the loud-speakers during class hours or at functions which students are required to attend.

a. Except as limited above, this policy permits any student to pray in the school silently or audibly when it is not disruptive.

b. School administrators may set aside a short period for silent thought or meditation by students during the school day.

3. [*sic*] This policy permits teachers to explain the background or significance of religious content and beliefs where appropriate to the subject matter they are teaching.

d. This policy permits both teachers and students to recognize, reiterate or read aloud or over the loudspeakers his-

tion of prayer and other religious passages over the loudspeaker during classes or at functions where student attendance was required. The court interprets the policy to also proscribe outside groups from distributing Bibles or other religious literature to the students on school premises and during school hours. Despite these restrictions, the new policy recognized the right of individuals to offer voluntary nondisruptive prayers and the right to use religious materials solely for their literary and historical values. Thus, it appears to the court that this policy does not violate any provisions of the Constitution, but rather, it strikes the correct balance between the First Amendment's mandate against governmental establishment of a religion and its protection of the free exercise of religion.

Notably, the president of plaintiff Lubbock Civil Liberties Union, a professor of Constitutional Law at Texas Tech Uni-

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torical documents or portions thereof or statements from recognized figures, even though such statements include personal religious beliefs.

4. The School Board permits students to gather at the school with supervision either before or after regular hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

5. Religious literature other than necessary for classroom work shall not be disseminated during class hours but may be purchased, indexed, shelved and circulated as library material.

a. This policy permits one student to offer religious literature to another student on a private non-intrusive and non-disruptive basis.

b. This policy permits volunteer groups of students to disseminate religious literature on a non-disruptive basis to the members of the group.

c. This policy permits any teacher to use historical documents or patriotic materials in the classroom where appropriate to the subject matter being taught.

6. There shall be no religious tests required of applicants for employment."

versity, agreed with the court's position as he testified to the constitutionality of the August 26 policy.

Further, this court is of the opinion that this written policy does not violate Article One, Sections Six and Seven of the Texas Constitution.

The court fully recognizes the implementation problems which could arise with respect to this policy since it is impossible and impractical to formulate a written resolution covering every conceivable fact situation. Plaintiff strongly urges that Paragraph Four of the policy of August 26, 1980 is violative of the Constitution. It is noted that this policy permits students of all groups to gather at the school, either before or after regular hours, on the same basis as other groups, so long as attendance at such meetings is voluntary. It is the undisputed testimony before this court that there will be no extra expense accruing to the Lubbock Independent School District resulting from these meetings before or after school. In the event that such expense is incurred the group using the school facilities will be required to pay for same. Again, it is the implementation of this policy and the practices and acts thereunder that will be determinative of any constitutional violations. This court will not hesitate to assert its jurisdiction in the event that it is later shown that, pursuant to the policy, the defendants are permitting or encouraging acts or practices which violate either the establishment or the free exercise clause of the First Amendment.

INJUNCTIVE RELIEF

In order to merit the issuance of an injunction, the plaintiff must show an imminent threat of harm and that the injunction would impose upon the defendant no restriction greater than necessary to protect the plaintiff from the injury of which he complains. *Meltzer, supra* at 568.

The court finds that no injunctive relief is necessary at this time to correct any past unconstitutional practices by the defendants or to insure future adherence to the policy of August 26, 1980.

First, any threat of harm from past violations by the defendants has disappeared with the passage of the August 26, 1980 policy which strictly prohibits the previous practices. The evidence shows that this new policy has not been criticized nor has it been the subject of any complaints.

Second, the court holds that the defendants have acted in good faith in seeking to draft a proper constitutional procedure, and thus, it is unnecessary to affirmatively enjoin the defendants to carry out the provisions of the August 26, 1980 policy. There is no evidence indicating that defendants will not implement the new resolution as they have so avowed. This conclusion does not in any way condone the defendants' prior unconstitutional practices, but the conduct of the school officials in attempting to stop some of the more flagrant practices and in issuing guidelines for all employees to follow in accordance with school policies, cause this court to believe that injunctive relief is simply unwarranted at this juncture. Again, the court does not mean that similar practices and acts, if done in the future, would not be violative of both the Board's policy and the Constitution; however, this will have to await the facts and circumstances of each particular case.

DECLARATORY RELIEF

Although a defendant may cure his allegedly offensive conduct and foreclose the necessity for an injunction, the appropriateness of declaratory relief must be considered independently. *Meltzer, supra* at 568.

The court deems it necessary and does declare that the defendants' acts and practices prior to August 26, 1980, as enumerated above, deprived students of their constitutional rights to the free exercise of their religion. Further, there has been a violation of the establishment clause of the First Amendment since the bulk and large majority of all religious practices favored one particular belief. *See discussion Meltzer supra* at 570-573.

DAMAGES

As stated above, the plaintiff does not having [*sic*] standing to bring an action for actual damages and only nominal damages will be awarded.

The evidence does not reveal such malice or ill will that would form a basis for an award of exemplary or punitive damages and none will be awarded.

This suit was filed on September 27, 1979, and the court finds that as a result of the complaint filed by the plaintiff, the School Board adopted and changed its previous policies so as to comport with constitutional guidelines and hence reasonable attorney's fees must be awarded to the plaintiff.

All costs are taxed as against the defendants and such costs will include a taxing of reasonable attorney's fees in favor of plaintiff's attorney.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 28th day of November, 1980.

/s/ Halbert O. Woodward
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-2384

D.C. Docket No. CA-5-79-119

LUBBOCK CIVIL LIBERTIES UNION,
Plaintiff-Appellant,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before POLITZ and RANDALL, Circuit Judges, and GORDON*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part;

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* District Judge of the Eastern District of Louisiana sitting by designation. Judge Gordon concurred in the above opinion before his death March 4, 1982.

reversed and that this cause be, and the same is hereby remanded in part to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendants-appellees pay to the plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 11, 1982

A true copy

Test GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Betty G. Martinez
Deputy
New Orleans, Louisiana
July 26, 1982

ISSUED AS MANDATE: July 26, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 80-2384

LUBBOCK CIVIL LIBERTIES UNION,
Plaintiff-Appellant,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants-Appellees.

July 16, 1982

Appeal from the United States District Court for the Northern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before POLITZ and RANDALL, Circuit Judges*.

PER CURIAM:

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 25 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

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*Judge Jack M. Gordon, District Judge of the Eastern District of Louisiana, sitting by designation, concurred in the opinion before his death March 4, 1982. The petition for rehearing is being decided by a quorum. 28 U.S.C. 46(d).

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS and GARWOOD, Circuit Judges.

REAVLEY, Circuit Judge, with whom CLARK, Chief Judge, GEE and GARWOOD, Circuit Judges, join, dissenting from a Denial of Rehearing En Banc:

I respectfully dissent from the denial of rehearing en banc. The Lubbock Independent School District has made a good faith attempt to enact and enforce a constitutional policy in a critical area. When we strike down a significant part of that policy, we should give that school district, and others, more guidance on what is permissible and impermissible than can be found in the panel opinion.

We can hope that a school district may, with Fifth Circuit approval, allow meetings of students with purposes which include religion, so long as there is no continuing faculty supervision of the meetings, and so long as the meetings are not held at a time closely associated with the school day.

The panel opinion can be construed to go much further. It clearly does require that the school policy be edited so as not to appear to deal separately with students gathering for a religious purpose, although that requirement mystifies me. The school district policy deals with a non-secular topic, as this court does just now, but the provision relative to student meetings—as the ones relative to teaching and printed materials—serves the secular purposes that are approved by the opinion often cited, *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

The panel opinion seems to me either to be misleading or to reflect a misreading of the record. Over the last decade the Lubbock Independent School District has never approved of the practice of a teacher leading classroom prayers, nor did it approve religious assemblies nor sponsor speakers at assemblies because they were evangelists. The intention of the Super-

intendent of Schools was that the school administration be neutral toward all matters of religion. Corrections were found to be necessary in 1980, but it does not follow that there was any prior disregard on the part of the school administration for the First Amendment.

The panel faults the school district for failing to introduce evidence on the meaning and operation of the 1980 policy. Perhaps the school district attorney thought the policy spoke for itself. Furthermore, there is no adverse evidence in the record, and no witness testified, against the 1980 policy or the brief experience with it. Indeed, the president of the Lubbock Civil Liberties Union, a professor of constitutional law, testified that he thought the new policy was constitutional.

Any disagreement of mine with the panel on the reading of the record would not justify en banc consideration. The following reasons, in my opinion, do so:

1. The panel opinion may be taken to hold that ¶ 4 of the 1980 policy, standing alone, would be a First Amendment violation for any and all public elementary and secondary schools. If this is not the holding, others should be told that the context of policy and prior practice in Lubbock makes the difference. If ¶ 4 is invalid for all, but if changes can be made relative to "supervision" and meeting times ("before or after hours") which would avoid the infirmity, that needs to be stated. On the other hand, if it is to be Fifth Circuit law that students of public schools may not meet in school facilities for religious purposes, the court should leave no doubt about it.

2. At the conclusion of the discussion of the purpose of ¶ 4, the panel says:

> The District's justification for the religious meetings, the development of leadership and communicative skills, cannot withstand scrutiny when those goals can be attained through non-religious student associations.

669 F.2d at 1045. Perhaps the panel is still concerned here with the separate policy statement for "religious

meetings." If so, the objection could be easily satisfied. But the panel may be saying that permissible secular purposes, the development of leadership and communicative skills, can be attained only through non-religious student associations. I would find that position objectionable because it discriminates against religious belief and speech, and it is inconsistent with *Brandon*.

3. In the discussion of whether the policy advances religion even though the student meetings take place before or after school buses run, the panel finds:

> [T]hat it is the Texas compulsory education machinery that draws the students to school and provides any audience at all for the religious activities, whether the buses have run or the school day has "officially" begun.

And the panel further states:

> [T]he critical factors are the District's use of its compulsory education machinery, which provides students available to attend even voluntary meetings, and its implicit support and approval of the religious meetings.

669 F.2d at 1046. I am unable to understand what the panel considers to be the particular vice. *Brandon* was concerned about the setting of a captive audience and the symbolism for impressionable students where meetings were held during school hours, though before classes began. The panel here appears to be looking at something different, although the objection may be similar. Perhaps the objection is to the machinery of public education that brings the children to *attendance on the school grounds* at a time when a religious meeting is permitted. The rationale of *Brandon* would have some application if that is the objection. But, instead of drawing the students into attendance, the objection may be that the public machinery provides the *students* themselves who get together and make the decision to form some organization to meet at any time, even after they have first departed and then returned to the school building. If the panel objects on the latter basis, I am unable to understand the reason for it.

4. Finally, I cannot be sure what the panel considers to be impermissible entanglement. Perhaps they only object to continuing faculty supervision of the students and the meetings themselves. Or it may be that the panel equates excessive entanglement with the minimal precautions the school would have to take for its property and rules when any student group meets in its facilities. If so, again, we forbid student meetings where there is a religious purpose.

The panel quotes at length from Justice Black's opinion in *Everson*. It should be recalled that the specific holding in *Everson* was that New Jersey had not violated the establishment clause by authorizing local boards of education to reimburse parents for the cost of having the children ride the public buses to school, including to a parochial school. The objective has been neutrality toward believers and nonbelievers. Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief?

I fully understand and completely agree with Judge Kaufman when he objected in *Brandon* to giving impressionable children the appearance that the state places its imprimatur upon any faith or religious practice. We should not forget, however, that the young student may also be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. I would consider that a very great wrong to the children, to the Constitution and to the nation.

Office Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-805

LUBBOCK INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I

QUESTION PRESENTED

Whether it is an unconstitutional establishment of religion to permit primary and secondary student religious groups "to gather at [public school facilities] with supervision either before or after regular class hours. . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-805

LUBBOCK INDEPENDENT SCHOOL DISTRICT ET AL.,
Petitioners

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Fifth Circuit's decision in this case is reported at 669 F.2d 1038. The District Court's opinion was not published. Reference to the Petitioners in this Brief will be by the term "the District," while the Respondent will be called "the Union."

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATION INVOLVED

The First Amendment to the United States Constitution and the regulation involved (Paragraph 4 of the August 26, 1980, statement of policy on religion in the schools of the Lubbock Independent School District) are set forth in the Petition at p. 2.

Article 1, sections 6 and 7 of the Constitution of the State of Texas provide:

> Sec. 6. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the right of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.
>
> Sec. 7. No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purpose.

Section 12.04(2) of the Texas Family Code provides:

> Except as otherwise provided by judicial order or by affidavit or relinquishment of parental rights executed under Section 15.03 of this code, the parent of a child has the following rights, privileges, duties,

and powers: * * * (2) the duty of care, control, protection, moral and religious training and reasonable discipline of the child * * *.

STATEMENT

Respondent Lubbock Civil Liberties Union brought the cause of action described in the Petition (pp. 2-3) because officials of the District, ignoring the Union's complaints, had permitted religious activities to continue unabated in the schools for nearly ten years. (Petition App. A, pp. 2a-3a).[1] During this time, the District's counsel notified the Union by letter dated May 3, 1971, that school policy "must be strict neutrality of all personnel regarding religious activities" and declared that the practices would cease. (*Id.*). They did not.[2]

After receiving additional complaints, the District's Board of Trustees adopted a supplemental written policy on religion in January, 1979, and later adopted procedures permitting "student initiated and directed religious

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1. Whether the District "approved" of the practices is of little moment; the District stipulated that Bible passages, religious inspirational passages and prayers were read over the public address system, that periods of silent meditation were ended with "Amen" over the public address system, and that Gideon Bibles were distributed, pursuant to written policy, to students in the fifth and sixth grades. There was also evidence of the occurrence of religious activities before assemblies. (Petition App. B, p. 28a). As the district court observed, "the fact is that the ultimate control remained in the school. . . ." (*Id.*, p. 29a). A full report of all such activities, and others, was before the District Trustees when they directed a continuation of such practices. (n. 3, *infra*).

2. After the District's counsel wrote that the practice of placing Gideon Bibles "in the hands of students" would be discontinued, for instance, the Gideons were permitted instead to place their New Testaments on a table for students to pick up. (Petition App. A, p. 3a, n. 3).

activities." (*Id.*, p. 4a).[3] The Board's own minutes indicate that the unconstitutional practices were to be permitted to continue, and its own surveys indicate that they did. (*Id.*, p. 5a).

The Union filed this lawsuit the following September, but the District waited another eleven months, until after discovery, the pretrial order and docketing for trial, before adopting its new religion policy of August 26, 1980. (*Id.*, pp. 5a-6a).[4] Though purporting to proscribe most of the prior religious activities, the policy did authorize, in Paragraph 4, supervised student religious gatherings before and after class hours,[5] and the Union "strongly urge[d]" the unconstitutionality of that provision before the trial court (Petition, p. 2), to no avail. (Petition App. B, p.

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3. The policy reads *in toto* as follows:
Insofar as religion is concerned, the Lubbock Independent School District adheres to the principle of freedom of religion as expressed in the Constitution of the United States and the Constitution of the State of Texas.
(Petition App. A, p. 4a). Before procedures to implement the policy were adopted, one of the District's trustees suggested that divine guidance might be needed to interpret the rule. (Reporter's transcript of proceedings, hereinafter designated "Tr.", 332-33).

4. The adoption of the new policy, which expressly superseded that of January, 1979, did not render moot the question of whether the prior practices were unconstitutional and deprived students of First Amendment rights, and the trial court found the District's acts, conduct and practices under that policy to be unconstitutional. (Petition App. B, pp. 29a-30a). This issue, along with the issues of damages and injunctive relief originally pleaded by the Union, have not been preserved for review.

5. Paragraph 4 provides:
The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet [sic] for any educational, moral, religious or ethical purposes so long as attendance at the meetings is voluntary.

32a). That court seemed satisfied to say, without consideration of the three-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971),[6] that if the religious activity groups gathered voluntarily and without expense to the District, there was no establishment clause violation. (Petition App. B, p. 32a).[7]

On appeal taken by the Union, a panel of the Fifth Circuit properly applied the *Lemon v. Kurtzman* test (Petition App. A, pp. 13a-20a) to conclude:

> (1) that the pre-eminent purpose of Paragraph 4, in the context of the total school policy on religious activities, is "more clearly designed to allow the meeting of religious groups," and that such proffered secular justifications as the development of leadership and communicative skills "cannot withstand scrutiny when those goals can be attained through non-religious associations." (*Id.*, pp. 13a-14a);
>
> (2) that Paragraph 4, "in the context of the overall policy of which it is an integral part," authorizing as it does "supervised student meetings at a time closely associated with the school day" implies "support and approval of the religious meetings" that has the primary effect of advancing religion. (*Id.*, pp. 15a-18a); and

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6. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally, the statute must not foster "an excessive government entanglement with religion." [Citation omitted].

7. The trial court studiously avoided any mention of the supervision requirement, or of the unfettered discretion reserved to administrators in paragraph 4 to determine which religious groups would be acceptable to use facilities "on the same basis as other groups."

(3) that the entanglement created by Paragraph 4's supervision requirement and the use of school facilities leads to an impermissible establishment of religion. (*Id.*, pp. 18a-20a).

A dissent to the denial for motion for rehearing *en banc* (Petition App. D) attempted to reassert the time-worn and discredited notion that the requisite governmental neutrality toward religious believers and nonbelievers alike, *Everson v. Board of Education*, 390 U.S. 1, 18 (1947), might be equated with the notion "that our government and the courts and the schools are hostile to all religious belief and practice." (*Id.*, p. 41a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Fifth Circuit's decision is not inconsistent with this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981).

This is an establishment clause case, and the Fifth Circuit's ruling follows the settled law found in the pertinent decisions of this Court. There is no conflict with decisions from other circuits,[8] and the District makes no

8. *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. den'd*, 454 U.S. 1123 (1981), which will be discussed, *infra*, is directly in point. Other recent cases where public school religious practices have been held to violate the establishment clause include *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Collins v. Chandler Unified School District*, 644 F.2d 759 (9th Cir. 1981), *cert. den'd*, 454 U.S. 863 (1981); *Mangold v. Albert Gallatin Area School District*, 438 F.2d 1194 (3rd Cir. 1971); *DeSpain v. DeKalb County Community School District*, 384 F.2d 836 (7th Cir. 1967), *cert. den'd*, 390 U.S. 906 (1968); *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. den'd*, 382 U.S. 957 (1965).

such contention. Similarly, it does not argue that its failure to provide religious facilities would effectively foreclose or even impair students' practice of religion, nor that Paragraph 4 is mandated by the free exercise clause.[9]

The District does, however, attempt to manufacture a conflict with this Court's decision last term in *Widmar v. Vincent*, 454 U.S. 263 (1981). Its argument, though, fails to recognize the different principles of law involved in the two cases, and in placing its reliance in *Widmar*, the District strays beyond the scope of the establishment clause question it has presented. (Petition, p. i).

Throughout the trial and appeal, the District adhered to its defense of Paragraph 4 as a vindication of the free exercise clause. (Petition App. A, p. 20a). The Union insisted, and the Fifth Circuit agreed, that Paragraph 4 permitted an unconstitutional establishment of religion. (*Id.*, p. 22a). The opinion below quoted frequently with approval from the decision in the identical case of *Brandon v. Board of Education*, 635 F.2d 971 (2nd Cir. 1980), *cert. den'd*, 454 U.S. 1123 (1981), where the court held that to compel the school district to permit religious ac-

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9. The District operates 48 public schools, while there are "over 240 churches representing every major denomination" in the City of Lubbock. Lubbock Chamber of Commerce, *Lubbock, Texas . . . at a Glance* (1982). Appropriate religious assembly facilities would include thousands of homes and privately owned theatres and commercial buildings. Nationwide in 1977, the year mentioned by the District (Petition, p. 8, n. 7), students in the 88,025 public schools had their choice of attending any of the 333,175 churches also in operation. Department of Commerce, *Statistical Abstract of the United States* 55 (100th ed. 1979). It is difficult to argue that but for the District's benevolence, *any* student would be denied the opportunity to worship as he or she chose. *Cf. School District of Abington Township v. Schempp*, 374 U.S. 203, 226, n. 10 (1963), which mentions, without comment, the practice of holding religious services for military personnel who otherwise would be unable to practice their faiths.

tivities before and after class hours would violate the establishment clause.[10] Now, almost as an afterthought, the District argues that *Widmar* controls this case.[11]

This Court's decision in *Widmar* turned not on the religion clauses, but on the free speech clause of the First Amendment, and the Court distinguished *Widmar* from cases such as this precisely on that basis. *Id.*, 454 U.S. at 273, n. 13. This is an establishment clause case, not a free exercise nor a free speech case, and when that is recognized and understood, the paradox discovered by the District (Petition, p. 9) evaporates into the ether out of which it was conjured.

Nor does this case raise the question reserved in *Widmar* that would arise if state accommodation of free exercise and free speech rights should conflict with the prohibitions of the establishment clause. *Id.* It is true that the free

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10. The District says there is a difference between the question of whether a public school *may* provide voluntary religious groups with equal access to school facilities, and whether it *must* (Petition, pp. 8-9), but that ignores the obvious: the unconstitutionality of the religious activity is the same. *Compare McCollum v. Board of Education*, 333 U.S. 203 (1948), where the Court held unconstitutional the permissive practice of allowing religious instruction in public schools during class hours. The District's distinction is one without a difference. On the other hand, its theory, that Paragraph 4 at once accommodates the students' free exercise rights (Petition, p. 15) and yet serves a secular purpose (Petition, p. 10) is too self-contradictory to merit discussion.

11. The District's free speech theory was not litigated below, and the Union respectfully suggests that it came too late, on motion for rehearing at the appellate level, for certiorari review. If free speech had been the goal, there would have been no "as determined by the school administration" test. The administration's determination was demonstrated conclusively to promote evangelistic Protestant doctrine and to suppress by prohibition and punishment such heresy as Catholicism (n. 26, *infra;* Tr. pp. 61-64; 351-53; 355-58; 362-65; 369; 380; 396-401; 405-06; D. Ex. 22).

exercise clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, but a violation of that clause "is predicated on coercion while the Establishment Clause violation need not be so attended." *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). The District has demonstrated no such coercive free exercise violation to conflict with the violation presented here.[12] Thus, the only issue is whether the majority may use "the machinery of the State to practice its beliefs," *Id.* at 226, and since the establishment clause emphatically forbids such use,[13] the question presented does not warrant review by this Court.

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12. Properly construed, the religion clauses complement rather than conflict. One prohibits the compulsory acceptance of any creed or form of worship, while the other guarantees the free exercise of the chosen practice. "Thus the Amendment embraces two concepts, —[sic] freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940).

13. While the establishment clause makes no mention of the separation of secular student groups and the state, it does dictate the separation of student religious groups and the state. In every case involving organized religious exercises in the public schools, compulsory or voluntary, state or student initiated, publicly or privately financed, the practices have been declared violative of the establishment clause. *See*, e.g., *Stone v. Graham*, 449 U.S. 39 (1980); *School District of Abington Township v. Schempp, supra; Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Board of Education, supra; Brandon v. Board of Education, supra; Meltzer v. Board of Public Instruction*, 548 F.2d 559 (5th Cir. 1977), *cert. den'd*, 439 U.S. 1089 (1979); *Stein v. Oshinsky, supra; Hunt v. Board of Education*, 321 F. Supp. 1263 (S.D. W.Va. 1971); *Kent v. Commissioner of Education*, 402 N.E.2d 1340 (1980); *Johnson v. Huntington Beach Uni[illegible] High School District*, 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (197[illegible], *cert. den'd*, 434 U.S. 877 (1977); *Commissioner of Education v. School Committee of Leyden*, 358 Mass. 776, 267 N.E.2d 226 (1971), *cert. den'd*, 404 U.S. 849 (1971); and other cases mentioned in note 8, *supra*.

2. The Fifth Circuit properly applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

Paragraph 4, promulgated as part of a policy "relating to religion" (Petition App. A, pp. 5a-6a, n. 7) is not calculated to serve a secular purpose, and the principal or primary purpose of the policy is studiously to advance religion. Moreover, the use of public school facilities and the supervision requirement each constitute "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). If Paragraph 4 violates *any* of the three *Kurtzman* principles, it is violative of the establishment clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

a. **Secular Purpose.** The District's "neutral, nonpreferential policy of equal access" (Petition, p. 9) demonstrates either its misunderstanding of or its disregard for settled establishment clause principles. The neutrality which the First Amendment requires is that which neither favors nor affirmatively opposes religion. *School District of Abington Township v. Schempp, supra*, 374 U.S. at 225. As Mr. Justice Frankfurter wrote, concurring in the Court's decision in *McCollum v. Board of Education*, 333 U.S. 203 (1948), "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, *not merely to treat them all equally*." [Emphasis supplied]. *Id.* at 227.

Widmar v. Vincent, 454 U.S. 263 (1981), upon which the District places total reliance, is inapposite. *Widmar* involved a university, and the secular neutrality required of a public school was not an issue. Moreover, its holding is limited expressly "to the context of a public forum

created by the University itself." *Id.* at 276, n. 20. On the other hand, as this Court has acknowledged on several occasions, there are "generally significant differences" between institutions of higher learning and elementary and secondary schools. College students are "less impressionable and less susceptible to religious indoctrination" than younger ones. *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971). *See also Widmar v. Vincent, supra*, 454 U.S. at 274, n. 14; and *Roemer v. Board of Public Works*, 426 U.S. 736, 750 (1976).[14] Mr. Justice Frankfurter recognized this impressionability when he went on to observe that "[i]n no activity of the State is it more vital to keep out devisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." *McCollum v. Board of Education, supra*, 333 U.S. at 231.

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14. In *Roemer* the Court noted that "[c]ollege students are less susceptible to religious indoctrination; college courses tend to entail an internal discipline that inherently limits the opportunities for sectarian influence; and a high degree of academic freedom tends to prevail at the college level." *Id.* at 750.

The District here, by supervising religious sessions, would usurp the exclusive right and power of the Texas parent to provide moral and religious training, TEX. FAMILY CODE ANN. § 12.04(2) (Supp. 1982), and would convert the tax-erected school house into a church for temporary periods in direct violation of the Texas Bill of Rights, TEX. CONST. ANN. art. 1, sec. 6 and 7 (1955). In *Tilton*, 8 justices agreed the Establishment Clause would be violated if any religious worship or instruction were ever permitted in college or university buildings constructed with federal funding. The unbroken history of classroom Bible reading and distribution in this case (the latter is still expressly permitted by a never-repealed regulation), of compulsory assembly, militant evangelism, and prohibition of Catholic, Jewish, Unitarian, Muhammadan, Buddhist, and other religious observances and practices render clear the purpose and effect of "supervised" religious assembly. The falsity of the District's avowal that assembly would be at no cost is obvious to any parent who has shouted "Shut that door" to a vanishing child and a North wind.

The organization of public schools is premised upon the isolation of secular education from all religious teaching, *School District of Abington Township v. Schempp, supra,* 374 U.S. at 218, quoting from *Everson v. Board of Education,* 330 U.S. 1, 23-24 (1947) (opinion of Jackson, J., dissenting).[15] Thus "the students' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting." *Brandon v. Board of Education,* 635 F.2d 971, 980 (2nd Cir. 1980), *cert. den'd,* 454 U.S. 1123 (1981).

Indeed, the District's "secular purpose" argument is not really that Paragraph 4 would vindicate students' free speech rights (although it presses that point later, Petition, p. 15), but that the policy "fosters the students' intellectual, cultural, and social growth *and thereby furthers the essential goals of public education.* (Petition, p. 10, emphasis supplied). An exercise of such pre-eminent religious character is not consistent with the District's secular excuses,[16] *School District of Abington Township v.*

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15. On the premise that public schools unduly monopolized the children's time and that the churches were entitled to a share of it, religious leaders early in this century developed the concept of "released time" programs which tended to take the form later approved in *Zorach v. Clauson,* 343 U.S. 306 (1952). The teaching was on church premises, the school had no control over the choice of instructors nor the subject matter taught, and it did not assume any responsibility for the students' attendance, conduct or achievement in the church school. "[O]nly when challenge is made to the share that the public schools have in the execution of a particular 'released time' program" does the necessity for judicial scrutiny arise. *McCollum v. Board of Education, supra,* 333 U.S. at 224-25 (opinion of Frankfurter, J., concurring).

16. The secular reasons mentioned in the District's Petition must be regarded as speculative at best since, as the court below noted, there was no testimony from school board members or school authorities to support the District's claims. (Petition App. A, p. 14a, n. 13).

Schempp, supra, 374 U.S. at 224, and as the court below concluded, the state may not employ religious means to serve otherwise legitimate secular interests. (Petition App. A, p. 14a).

b. **Primary Effect of the Policy.** Just as First Amendment rights generally must be analyzed " 'in light of the special characteristics of the school environment,' " *Widmar v. Vincent, supra,* 454 U.S. at 268, n. 5, quoting from *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969), so must the analysis be further refined when the environment is a public school as opposed to a university campus. As the Union has already noted in the text accompanying note 14, *supra,* this Court has long recognized the impressionability of public school children. It follows that public schools, unlike public universities, are not public forums, and while students have First Amendment rights to political speech in public schools, "sensitive Establishment Clause considerations limit their right to air religious doctrines." *Brandon v. Board of Education, supra,* 635 F.2d at 980.

Since the issue must be decided under the establishment clause, the crucial inquiry becomes not whether some incidental benefit accrues to a religious institution, but whether Paragraph 4 advances religion. *Tilton v. Richardson,* 403 U.S. 672, 679 (1971). The primary effect test necessarily inquires whether the consequence of the state action is to place its imprimatur upon the religious activity. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 216-19; *Engel v. Vitale,* 370 U.S. 421, 430-36 (1962).[17]

17. While one does wonder how the District would implement its policy in kindergarten and the primary grades (Petition, p. 13, n. 11), the appellate court's decision turned on no such speculation.

Paragraph 4 authorizes a practice virtually identical to the one condemned in *McCollum v. Board of Education*, 333 U.S. 203 (1948), except that the religious meetings here must be held "with supervision either before or after school hours."[18] The court below correctly observed that Paragraph 4 appears as a part of a policy on religious activities in the schools, the preamble of which "is obviously concerned with religious beliefs and the place of *religion* in the public schools." (Petition App. A, p. 13a, emphasis in original).[19]

The District fails to apprehend the fundamental distinction between free exercise and establishment clause violations, arguing as it does here (Petition, p. 11-12) and below (Petition App. A, p. 16a-17a) that since the

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Rather, it was the District's implicit recognition and approval of religious activities and meetings as an integral part of its extra-curricular program, "in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings [that] renders the primary effect of the policy impermissible advancement of religion." (Petition App. A, p. 15a-16a, emphasis in original). Indeed, the Lubbock teacher or administrator announcing a religious meeting after school would not have to add that he would take attendance to indicate compulsory attendance—but history forces the conclusion that he would add that admonition.

18. In *McCollum*, religious teachers employed by private religious groups were permitted to teach religion for thirty minutes each week during regular school hours. 333 U.S. at 205. The supervision contemplated in Paragraph 4 would be either by a school employee or a non-school employee acceptable to the District. (Petition App. A, p. 18a, n. 16).

19. The preamble to the August 26, 1980 policy on religion states:

> Wishing not to infringe either upon the belief of any student in a Supreme Being or upon the right of any student not to believe, the School Board places in effect the following policies relating to religion in the schools which supercede the policy on religion adopted on January 25, 1979.

(Petition App. A, p. 5a-6a, n. 7).

supervised religious meetings are voluntary and occur outside regular school hours, no coercion is involved. Coercion is not the issue. As this Court explained twenty years ago:

> Neither the fact that the prayer may be denominationally neutral *nor the fact that its observance on the part of the students is voluntary* can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. *The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.

Engel v. Vitale, supra, 370 U.S. at 430 (emphasis supplied). Likewise, in *School District of Abington Township v. Schempp, supra,* the Court observed that neither the opportunity for individual students to absent themselves nor the claim that the religious practices may be relatively minor encroachments on the First Amendment furnish any defense to a claim of unconstitutionality under the establishment clause. *Id.*, 374 U.S. at 224-25.

Finally, as the court below found, the supervised religious gatherings are permitted at a time closely associated with the school day, and the Texas compulsory education machinery[20] which draws the students to school

20. TEX. ED. CODE ANN. § 21.032, et seq. (1972 and Supp. 1982).

also provides any audience that is available for the religious activities. (Petition App. A, p. 17a). This "invaluable aid" has the primary effect of advancing religion, and it is not separation of church and state. *McCollum v. Board of Education, supra,* 333 U.S. at 212.

c. **Entanglement with Religion.** The policy which underlies Paragraph 4 is much more than the mere accommodation of school schedules to a program of outside religious instruction or closing the doors or suspending the operations "as to those who want to repair to their religious sanctuary for worship or instruction." *Zorach v. Clauson,* 343 U.S. 306, 315-16 (1952).[21] It entails the very "sponsorship, financial support, and active involvement of the sovereign in religious activity" which the drafters of the religion clauses sought to forestall. *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970).[22]

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21. The District seems to suggest that since "[w]e are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clauson, supra,* 343 U.S. at 313, establishment clause considerations go by the wayside. (Petition, p. 16). The author of the *Zorach* opinion, though, explained in his concurrence in *Engel v. Vitale, supra,* that " 'If a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government.' *McGowan v. Maryland,* 366 U.S. 420, 563 (dissenting opinion)." *Engel v. Vitale, supra,* 370 U.S. at 442-43 (opinion of Douglas, J. concurring).

22. The after-hours requirement does not save Paragraph 4 from constitutional scrutiny. (Petition, p. 12). To the contrary, in *Wolman v. Walter,* 433 U.S. 229, 255 (1977), transportation provided to sectarian schools for extracurricular activities was held to violate the establishment clause. In this case, as in *McCollum v. Board of Education, supra,* it is the supervision requirement, the compulsory attendance machinery, and the free benefit of school facilities, classrooms, heat and light, not merely the time of day, which creates the unconstitutional entanglement. *Id.,* 333 U.S. at 212. *Compare Commissioner of Education v. School Committee of Leyden,* 358 Mass. 776, 276 N.E.2d 226 (1971), *cert. den'd,* 404 U.S. 849 (1971), where voluntary student initiated, pre-class religious exercises were

The District would shift the focus of the inquiry by arguing that the "monitoring and censorship" required to enforce a prohibition of religious activity in the public schools would create a greater entanglement with religion than Paragraph 4 does. (Petition, pp. 14-15).[23] Once again the District confuses free exercise considerations with those of the establishment clause. Nothing in the First Amendment requires the District to police non-religious activities and weed out any mention of religion, and certainly it does not proscribe the private reading of religious literature, private discussions about religion among students, or even a hasty private prayer before an important exam.[24] What the establishment clause *does* prohibit is the officially sanctioned, supervised religious activity permitted by Paragraph 4.

The court below correctly applied the three-part test to conclude that Paragraph 4 fosters an impermissible establishment of religion. The court's conclusion is grounded in settled principles of law, and the District's effort to persuade this Court, in effect, to consider overruling decades of "inapposite school prayer cases" (Petition, p. 12) only serves to point up the District's misunder-

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held unconstitutional because they were on public property "with school committee permission granted by a resolution" and teacher participation was allowed. *Id.* at 228.

23. A strange plaint from the same governmental authority that volunteers to supervise religious activities and even mandates their supervision in the contested regulation. Is it easier to detect and restrain heresy than government-issue religion?

24. Indeed, the objective presentation of comparative religion or religious history, or the study of the Bible for its literary and historic qualities, is not only permissible, but is to be encouraged. *School District of Abington Township v. Schempp, supra,* 374 U.S. at 225. *See also Stone v. Graham,* 449 U.S. 39, 42 (1980); *Engel v. Vitale, supra,* 370 U.S. at 435, n. 21).

standing of the establishment clause principles involved. The question presented does not warrant review by this Court.

3. State neutrality toward religion is not to be equated with hostility toward religion.

This Court wrote in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[25] The District's policy of "sound accommodation of the interests of a religious people" (Petition, p. 16) is not religiously neutral, and considered in the light of the District's history of religious discrimination, it can hardly be called "benevolent" either. (Petition, p. 15).[26]

The District concludes its Petition with that shibboleth of all establishmentarians, that disestablishment is not

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25. *Accord, School District of Abington Township v. Schempp, supra*, 374 U.S. at 216; *McCollum v. Board of Education, supra*, 333 U.S. at 210.

26. In the past, the District's "neutrality" has taken the form of sanctioning "student initiated religious activities in accordance with the will of the majority". (Tr. 173, 211-12, 258-59, 351-52, 357-58, 369-70). Gideons, for example, could distribute their New Testaments, but Jehovah's witnesses could not pass out the *Watchtower* (Tr. 404-06), and Catholic and Buddhist parents who complained about the Gideon distribution in one school found their children removed from class and detained until they came to school and explained their complaint to the principal (Tr. 284-98).

Generally speaking, practices outside of the Protestant Christian tradition were not permitted (Tr. 250). Muhammadan, Buddhist, Shinto or Hindu prayers, for instance, could not be recited (Tr. 356-57); and even Roman Catholic Christian prayers were prohibited (Tr. 225-26, 352-53, 355, 376), while Protestant prayer was compelled.

neutral toward religion, but hostile instead.[27] That sophistry was first rejected nearly 35 years ago in *McCollum v. Board of Education, supra,* 333 U.S. at 211-12, and again in *Zorach v. Clauson, supra,* 343 U.S. at 314, *Engel v. Vitale, supra,* 370 U.S. at 435, and *School District of Abington Township v. Schempp, supra,* 374 U.S. at 225. It is no more meritorious today, and the question presented does not warrant review.

4. The Petition should be stricken because the District has permitted itself to be represented by counsel who speak in the interest of the Christian Legal Society.

The Christian Legal Society is an organization of evangelical Christian lawyers which, for its own sectarian reasons, has concerned itself with the outcome of this case. Ordinarily, such an organization would petition to appear *amicus curiae,* and Rule 36 of this Court prescribes the procedure to make such an appearance.

The Christian Legal Society elected not to appear *amicus curiae* in this case. Instead, it retained the Texas

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27. The District takes its cue from the dissent below (Petition App. D, p. 48a), which fell into the same trap, and goes on to argue that the decision below "teaches Lubbock school children that speech is 'free' only so long as it is purged of religious content and that governmental 'neutrality' requires invidious discrimination against their own voluntary, self-initiated religious activity." In support of this fallacy, the District cites *Brandon v. Board of Education,* 635 F.2d at 978: "Such '[m]isconceptions' over the appropriate roles of church and state learned during one's school years may never be corrected."

Read in context, the "misconception" concerning the court was not governmental hostility toward religion, but just the converse: "the mere appearance of secular involvement in religious activities [which] might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit." *Id.*

and District of Columbia firm of Fulbright & Jaworski to appear as co-counsel with the District's counsel of record, who ostensibly remains in charge of the case. Nevertheless, according to the Christian Legal Society's executive director, that organization and its staff are the motivating force behind the Petition, and is actually doing the work:

> When [the Christian Legal Society] first began thinking about the Lubbock case, one of the questions was whether the alleged bad faith of the school district was going to make it impossible to effectively raise [sic] the larger issue but felt since it was now the case in the system and Christian student groups were being shut down throughout the United States on the basis of *Brandon v. Guilderland School District* and now *Lubbock*, there was little choice to fight where the battle raged.
>
> Initially, our concern was to gain certiorari from the Supreme Court. A task you know is quite difficult. In order to cali to the Court's attention the seriousness of this case, we felt that obtaining the assistance of someone like Jaworski might be very crucial. Through Bill Bright and others we contacted Mr. Jaworski who indicated a willingness to file an amicus brief. Then, of course, the question was whether an amicus brief would be adequate to get the Court's attention and *whether we didn't need more substantive involvement of* [sic] *the case*, and at that point, after discussions with Fulbright, Jaworski and present council [sic] for the school board, a minimal involvement as co-counsel by Fulbright and Jaworski was developed. *Most of the legal work being done by our own staff*—and I am unclear as to what the distinction is between employing our own staff and employing other competent staff.

App., *infra* (emphasis supplied).

The issue is not who does the work, but for whom it is done. The situation here is not unlike the one addressed by the Ethics Committee of the New York Bar Association,[28] where an attorney proposed to represent property owners opposing a zoning change to allow the erection of a garage, but who was actually compensated by competitive garage owners who objected to it for business reasons. The Committee concluded that it is improper for an attorney to represent one client when he is really speaking in the interest of another. Similarly here, while Fulbright & Jaworski purports to represent the District, the executive director's letter (App.) makes it clear that the firm is really speaking for the interest of the Christian Legal Society.[29]

The Union would respectfully suggest that if this does not represent a fraud on the Court, the District's complicity in this scheme, at the very least, ignores the untenable and irreconcilable conflict of interest between the avowedly sectarian goals of the Christian Legal Society and the constitutional requirement of sectarian neutrality by which the District must abide. The Union thus submits that the District's Petition should be stricken and its prayer for a writ of certiorari denied.

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28. Ethics Committee of the New York Bar Association, *Opinion* No. 116 (1928-29).

29. This is not a situation where a lawyer represents multiple clients after full disclosure and consent, Code of Professional Responsibility, D.R. 5-105(C), for the Christian Legal Society is not a party before the Court. Nor is this merely a situation where a lawyer, paid to render legal services for another, permits his professional judgment to be directed or regulated by the one employing him, D.R. 5-107(B), for the District appears to have consented to do just that, playing the property owner for the Christian Legal Society's competitive garage owners.

CONCLUSION

This Court denied petition for writ in the mirror-image case of *Brandon v. Board of Education, supra.* Upon that precedent, and for the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December, 1982

APPENDIX

CHRISTIAN LEGAL SOCIETY
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September 29, 1982

Mr. Daniel Benson
5416 16th Place
Lubbock, Texas 79416

Dear Dan:

Thank you for your letter of the 24th expressing your concern regarding CLS involvement in the Lubbock case and the indication of your withdrawing membership from CLS.

I appreciate your frank expression of concern and I doubt if actually you and I are very far apart on the substantive issues raised in your letter. It is quite clear that the Lubbock School Board over a period of years had deliberately violated what they knew, or should have known, were the constitutional mandates of separation of church and state. Sadly, of course, that makes the legitimate issues in the present case harder to bring effectively to the court's attention. I am sure there were parents of deep religious conviction who felt very concerned about those school policies and whose children may well have been intimidated by them.

It was our position that independent of past constitutional violations, the legal question of whether the current policy treating religious student groups on the same footing as non-religious student groups was still at issue.

When we first began thinking about the Lubbock case, one of the questions was whether the alleged bad faith of the school district was going to make it impossible to effectively raise the larger issue but felt since it was now

the case in the system and Christian student groups were being shut down throughout the United States on the basis of *Brandon v. Guilderland School District* and now *Lubbock*, that there was little choice but to fight where the battle raged.

Initially, our concern was to gain certiorari from the Supreme Court. A task you know is quite difficult. In order to call to the Court's attention the seriousness of this case, we felt that obtaining the assistance of someone like Jaworski might be very crucial. Through Bill Bright and others we contacted Mr. Jaworski who indicated a willingness to file an amicus brief. Then, of course, the question was whether an amicus brief would be adequate to get the Court's attention and whether we didn't need the more substantive involvement of the case, and at that point, after discussions with Fulbright, Jaworski and present council for the school board, a minimal involvement as co-counsel by Fulbright and Jaworski was developed. Most of the legal work being done by our own staff—and I am unclear as to what the distinction is between employing our own staff and employing other competent staff.

We have also recently received the support of American's United who will be filing a brief on our behalf, National Association of Evangelicals, the Baptist Joint Committee and others often associated with separationist postures. We are convinced, therefore, that the constitutional question of whether a school *must* discriminate against religious expression is a crucial one and central to the early commitment to The Center for Law and Religious Freedom.

Defending a party who has some misconduct does not at all change the central legal question any more than our support of the Unification Church and its fight against government registration being improper. One of the things you as an attorney must recognize is the distinction between the legal issue and the client—an issue which for

The Center for Law and Religious Freedom is central to our involvement in this case.

It is always sad to us when persons choose to withdraw —not at all because of any lost revenue of "numbers of members"—but because we do see ourselves as trying to create a family, and like any family, there are inevitable differences of opinion. Our hope would be that when people disagree, they fight rather than flee and stay a part of the family. That decision, of course, must be made by each family member and it is our responsibility to honor it.

Sincerely,

/s/ LYNN
Lynn Robert Buzard
Executive Director

LRB:hce

Office - Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY MEMORANDUM

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY MEMORANDUM

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1. The participation in this case of several *amici curiae*, representing a wide range of interests and all urging that this Court grant the petition for a writ of certiorari, testifies eloquently to the substantial importance of the question presented.[1] Respondent does not contest the importance of the issue. Instead, respondent argues that the case was correctly decided below because, it claims, *Widmar* v. *Vincent*, 454 U.S. 263 (1981),

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[1] Six briefs *amici curiae* have been submitted, representing, *inter alia*, twenty-four United States Senators, the Texas Association of School Boards, students and parents in Lubbock, Texas, and several national church groups and other religious organizations.

is distinguishable, whereas *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), is not. A fuller discussion of those cases therefore may be helpful to the Court.

In *Widmar*, a public university had barred student religious groups from meeting in its facilities, even though it made those facilities available to other student groups. Members of a student religious group challenged the university's action as, *inter alia*, an abridgment of their freedom of speech. This Court held that the university's action did abridge free speech. The Court's holding, however, rested upon an analysis of the Establishment Clause.

The Court began with the proposition that "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University . . . must show that its regulation is necessary to serve a compelling state interest . . . ." 454 U.S. at 269-70. The "compelling interest" asserted by the university was that "it cannot offer its facilities to religious groups and speakers on the terms available to other groups without violating the Establishment Clause . . . ." *Id.* at 270-71. Consequently, the Court was required to consider and decide whether it is an unconstitutional establishment of religion to permit voluntary student religious groups to meet in public university facilities in the same manner as other voluntary student groups. Applying the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), the Court determined that a nonpreferential policy of equal access would not contravene the Establishment Clause. 454 U.S. at 271-75. It followed that the university had no compelling interest, and therefore no legal justification, for its refus-

al to permit student religious groups to meet in its facilities. *Id.* at 277.

Thus, respondent plainly errs in portraying *Widmar* as a case that "turned not on the religion clauses [of the First Amendment]." Br. in Opp. 8. The Court's disposition of the university's arguments under the Establishment Clause was integral to its analysis and necessary to its decision. Moreover, it is evident that the issue under the Establishment Clause that was decided in *Widmar* is virtually identical to the issue presented here. If anything, therefore, our petition was guilty of understatement when it asserted that "[t]he Fifth Circuit's decision appears to be inconsistent with this Court's decision last Term in *Widmar* v. *Vincent* . . . ." Pet. 8.

This case differs from *Widmar* only in two respects. First, this case arose in a different manner: whereas in *Widmar* the state had abridged speech and students sued to vindicate their rights, here the state has permitted speech and respondent is seeking a judicial abridgment. Second, this case involves a public school rather than a public university. These two differences indicate that, as the petition stated, "the question presented here is whether a public school *may* provide voluntary student religious groups with the equal access that a public university *must* provide under *Widmar*." Pet. 8-9 (emphasis in original). The Second Circuit's decision in *Brandon*, which was handed down before *Widmar* was decided, cannot answer this question. Because of respondent's reiterated reliance upon *Brandon*, however, that case warrants extended comment.

The facts in *Brandon* lay somewhere between those here and those in *Widmar*. On the one hand, *Brandon* involved a public school, not a public university. On the other hand, *Brandon* arose in the same manner as *Wid-*

mar: the school had discriminatorily excluded student religious groups from the use of its facilities, and students sued "to be treated in a manner similar to the secular student groups permitted to use the school's facilities." 635 F.2d at 974. The Second Circuit reasoned that the students could not complain of an abridgment of their freedom of speech, because "a high school is not a 'public forum' where religious views can be freely aired." *Id.* at 980. This aspect of *Brandon* need not detain us. The question whether a high school is a public forum does not arise in this case; the issue here concerns not whether speech has been abridged but, rather, whether it may be permitted.

Because the Second Circuit concluded that the student-plaintiffs in *Brandon* had no affirmative constitutional right to use the school's facilities, [2] it was not forced to consider whether such use would be barred by the Establishment Clause. The court nevertheless proceeded to consider that issue and to decide that to permit student religious groups to use school facilities on the same basis as other student groups would contravene the Establishment Clause. Respondent appears to believe that this Court's denial of the petition for a writ of certiorari in *Brandon* endorses the Second Circuit's decision on this point and amounts to a determination that the view of the Establishment Clause set forth in *Widmar* applies only to public universities and not to public schools. Br. in Opp. 7-8, 22. Respondent's belief is ill-founded. It is well understood that "denial of a petition for a writ of certiorari . . . carries with it no implication whatever

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[2] In addition to holding that there was no abridgment of the freedom of speech, the court held that the school's discriminatory exclusion of student religious groups did not prohibit free exercise of religion. *See* 635 F.2d at 975-78.

regarding the Court's views on the merits of [the] case which it has declined to review." *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

Beyond that, there is a special reason to refrain from giving weight to the denial of certiorari in *Brandon*. At the time this Court acted in *Brandon*, less than one week after the decision in *Widmar*, it apparently had the erroneous impression that the students in *Brandon* were seeking a favored status for religious groups *vis-a-vis* other student groups. Those were not the facts in *Brandon*. *See* 635 F.2d at 974, 978, 980. But the original slip opinion in *Widmar* stated:

> This case is different from the cases in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause. See *Brandon* v. *Board of Educ.*, 635 F.2d 971, 975-976 (CA2 1980), cert. pending, No. 80-1396.

50 U.S.L.W. 4062, 4065 n.13 (Dec. 8, 1981) (emphasis in original). This incorrect reference to *Brandon* was deleted from the opinion subsequently published in the official reports. *See* 454 U.S. at 273 n.13. Of course, singular favoritism to religious groups would be suspect under the Establishment Clause, and it is readily understandable that this Court would have denied certiorari in a case where the Court believed such favoritism had been unsuccessfully sought.

No favoritism to religion is involved here. Petitioner Lubbock Independent School District has adopted a neutral, nonpreferential policy of allowing voluntary student religious groups to meet in school facilities outside regular school hours on the same basis as other voluntary student groups. If the School District were a public university, adoption of that policy would have been con-

stitutionally required under *Widmar*. This Court should take this case to determine whether the Establishment Clause imposes a diametrically opposite obligation upon public schools.

2. Respondent's discussion of the three-part test of *Lemon* v. *Kurtzman* ignores this Court's recent application of that test.

a. In *Widmar*, this Court stated that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose . . . ." 454 U.S. at 271 (footnotes omitted). Respondent nevertheless suggests that, because public school students are more "susceptible to religious indoctrination," Br. in Opp. 11, an open-forum policy does not serve a secular purpose in public schools. But talk of indoctrination and "religious teaching," *id.* at 12, is beside the point. This case involves no religious teaching and, indeed, no state-initiated or state-conducted religious activity of any kind.[3] All that is involved here is the nonpreferential availability of school facilities for use by voluntary stu-

[3] Every case in which this Court has found a public school to be in violation of the Establishment Clause has involved either formal religious instruction or state-initiated or state-conducted religious activity. *See Stone* v. *Graham*, 449 U.S. 39 (1980) (posting copies of the Ten Commandments on school walls); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (requiring reading of Biblical passages and recitation of the Lord's Prayer); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (requiring recitation of prayer); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (permitting formal religious instruction on school premises during school hours); *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982) (requiring opportunity for public prayer during class).

dent groups outside regular school hours.[4] Even the court of appeals below appeared to recognize that a neutral policy of this kind could serve a secular purpose. *See* Pet. App. A, p. 13a.[5]

b. Respondent argues that the School District's policy of equal access serves to advance religion merely because it "appears as a part of a policy on religious activities in the schools . . . ." Br. in Opp. 14. This is an effort to make something out of nothing. The School District had been driven by this very litigation to review its "policies relating to religion in the schools." Pet. App. B, p. 30a n.1. Following that review, the policy of equal access was adopted as part of an effort to replace prior unconstitutional practices with a posture of strict neutrality toward religion. *See* Pet. 3-4. This background does not invalidate an otherwise constitutional policy of equal access. [6]

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[4] The content-neutral supervision of physical school premises contemplated by the School District's policy of equal access does not constitute religious teaching. Respondent nevertheless implies that religious instruction may take place. Br. in Opp. 11 n.14. *See also id.* at 13-14 n.17, 14 n.18, 17 n.23. If in fact the School District's policy were implemented in a manner that entailed religious instruction, or that favored one religious group over others, that would be improper. But that is not this case. The issue here is merely one of the facial validity of the School District's stated policy of equal access. *See* Pet. App. B, p. 32a.

[5] The court of appeals misguidedly rested its determination of the absence of secular purpose in this case upon the fact that the School District's policy was adopted as part of an effort to establish a posture of strict neutrality toward religion. *See* Pet. 3-4, 10 n.9.

[6] The petition points out that the policy of equal access does not act coercively "to infringe the rights of free exercise of [nonparticipating] children . . . ." Pet. 12, *quoting Abington School District* v. *Schempp*, 374 U.S. at 288 (Brennan, J., concurring). Respondent, misapprehending this point, states that "[c]oercion is not the issue."

c. In arguing that the School District's policy of equal access involves the state in an excessive entanglement with religion, respondent relies upon the "supervision requirement, . . . and the free benefit of school facilities, classrooms, heat and light . . . ." Br. in Opp. 16 n.22.[7] But content-neutral supervision of the school's physical premises, which is all that is contemplated by the School District's policy, is not unconstitutional. *See* note 4, *supra*. "[T]he minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," Pet. App. D, p. 41a, like the placing of a security guard at a school athletic event, does not amount to "excessive entanglement," *id.* As for the benefits of space, heat, and light, they did not raise problems of constitutional dimension in *Widmar* and therefore cannot do so here either.

3. The petition explains that the Establishment Clause does not require discrimination against religion. Pet. 15-16. Respondent replies that a policy generally favoring religion would be unlawful. Br. in Opp. 18-19. Respondent's observation is beside the point. The School District's policy of equal access does not generally favor religion. It merely treats student religious groups in the same manner as other student groups. Such even-handed

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Br. in Opp. 15. Yet, respondent goes on to complain that "the Texas compulsory education machinery . . . draws the students to school . . . ." *Id.* (footnote omitted). *See also id.* at 16 n.22. However, the School District's policy of equal access permits meetings to be held only outside regular school hours, when the state's "compulsory education machinery" is inoperative.

[7] Respondent also relies upon "the compulsory attendance machinery . . . ." Br. in Opp. 16 n.22. For reasons already discussed, this reliance is misplaced. *See* note 6, *supra*.

neutrality comports with the Establishment Clause. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947). [8]

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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December, 1982

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[8] Respondent also argues that it is improper for the School District to receive financial and legal support from others in order to defend itself against respondent's legal attack. Br. in Opp. 19-21. The contrary is well established. *See, e.g.*, Disciplinary Rule 5-107 of the Code of Professional Responsibility.

MOTION FILED
DEC 13 1982

No. 82-805

In the Supreme Court of the United States

October Term, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

vs.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AD HOC GROUP OF STUDENTS AND PARENTS IN LUBBOCK INDEPENDENT SCHOOL DISTRICT AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

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No. 82-805

In the Supreme Court of the United States

October Term, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

vs.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

This Ad Hoc Group of Students and Parents in Lubbock Independent School District respectfully moves the Court, pursuant to Supreme Court Rule 42, for leave to file the accompanying brief as amicus curiae in support of the petition for the grant of a writ of certiorari. The names and addresses of those comprising this ad hoc group of individuals is appended to this motion.

The consent of the parties to the filing of the brief has been sought. While Petitioners have consented, Respon-

dent has refused such consent. Accordingly, amicus proceeds by this motion.

As set out in the statement of Interest of Amicus Curiae found below, amicus submits that it is uniquely situated to assist the Court in evaluating the significance of the vital issues presented by the petition herein. The students represented in this group are among the relatively small segment of the population who have strong religious beliefs which are integral to every part of their lives and which demand expression in their lives. Prayer is an essential part of this life-style and commitment; for them, the religious dimension cannot be separated from the secular. These students draw encouragement and strength for daily living from prayer, both individual prayer and group prayer. Group prayer with other students is especially encouraging and enriching to these students. In addition, to many of the students, an opportunity for informal group Bible study and discussion is extremely important. They have no desire to attempt to force an unwilling student to pray or study with them, nor do they desire to have the leadership of their activities taken over by school personnel.

Amicus can add a perspective to the issues not adequately presented by the parties in this matter. This perspective deplores the insensitivity to the needs and desires of the students shown by the decision of the Court of Appeals below. This perspective also includes rejection of the notion that after-school meetings or before-school meetings in any way involve a "captive audience." This perspective also rejects the notion that students are so susceptible to religiously oriented peer pressure that the non-religious student will be coerced into attending religious meetings against his own wishes and against

the commands of his parents. Amicus strongly disagrees with the suggestion underlying the decision below that simply because a governmental entity allows neutral accommodation of religious exercise, the Establishment Clause is somehow violated because *someone may think* the governmental agency has a sympathetic attitude toward religious practitioners.

Amicus also argues that the Lubbock "equal access" policy protects the rights of public school students, while also respecting the right of parents to control the extent to which their children will be permitted to participate in religiously oriented extracurricular activities. Amicus appreciates the attempt by the Lubbock Independent School District to provide a neutral accommodation for student activities which does not discriminate against those students desiring to meet to pray together, and amicus contends that the decision of the Court of Appeals has unjustifiably interfered with a neutral accommodation policy.

Those individuals comprising amicus are also concerned about the national implications of the decision below, which will cause every school district in this country to be fearful of providing any accommodation at all for noncurricular student religious exercise.

The Court must determine whether the complex issues in this case demand full consideration by this Court. Counsel for amicus brings some experience and expertise to these issues, having served as counsel to the University student group "Cornerstone" in *Widmar v. Vincent*, 102 S.Ct. 269 (1981), in which this Court ruled that university religious groups were entitled to the benefits of an "equal access" policy because the Establishment Clause does not require the discriminatory withholding of facilities from religious groups at a public university.

For the foregoing reasons, amicus strongly supports the petition for certiorari and urges the Court to accept and consider the accompanying brief which sets forth the reasons for that support.

Respectfully submitted,

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Dated: December 13, 1982

APPENDIX TO MOTION

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   Parents of Carrie Cassell

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4. Mr. and Mrs. Jerry Morgan
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   Parents of Kurt Morgan

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   Lubbock, Texas 79412
   15 years of age -
   Monterey High School

6. Mr. and Mrs. Wayne Weeks
   2119 67th Street
   Lubbock, Texas 79412
   Parents of Stacy Weeks

7. Chris Buford
   3801 40th Street
   Lubbock, Texas 79413
   17 years of age -
   Coronado High School

8. Mr. and Mrs. Buddy Buford
   3801 40th Street
   Lubbock, Texas 79413
   Parents of Chris Buford

9. Miss Sarah Willis
   2317 49th Street
   Lubbock, Texas 79412
   17 years of age -
   Monterey High School

10. Mr. and Mrs. Arlie Willis
    2317 49th Street
    Lubbock, Texas 79412
    Parents of Sarah Willis

11. Miss Laura Lemon
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    17 years of age -
    Coronado High School

12. Dr. and Mrs. Lee Lemon
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    Lubbock, Texas 79416
    Parents of Laura Lemon

13. Sherman Button
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Monterey High School

14. Mr. and Mrs. Tom Button
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Parents of Sherman Button

15. Miss Laura Johnson
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16. Mr. and Mrs. Phil Johnson
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Parents of Laura Johnson

17. David Workman
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18. Mr. and Mrs. Don Workman
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19. Miss Clarissa McQueen
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20. Mr. and Mrs. Duane McQueen
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Parents of Clarissa McQueen

21. Randy Carman
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22. Mr. and Mrs. Jack Carman
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23. Tim Parker
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24. Mr. and Mrs. Frank B. Parker
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Parents of Tim Parker

25. Miss Pam Lowery
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26. Mr. and Mrs. Richard Lowery
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BRIEF OF THE AD HOC GROUP OF STUDENTS AND PARENTS IN THE LUBBOCK INDEPENDENT SCHOOL DISTRICT

INTEREST OF AMICUS CURIAE

The individuals comprising the group of students and parents (listed in the appendix to the Motion for Leave to File Brief) are students at the Monterey and Coronado High Schools in the Lubbock Independent School District. The ages of the students in this group range from 15 to 17 years. Parents of these students are engaged in a variety of occupations in the community, and the families represented herein are from various religious backgrounds. These students participate in a number of secular extra-curricular activities including Music Club, Industrial Arts Club, Tri-Hi-Y and Hi-Y, Band, Future Homemakers of America, and the school newspaper. These students also desire to participate in religious activities, including the fellowship of Christian Athletes, Young Life, and an informal Tuesday Bible study and prayer time. At the present time, the religious activities are not accommodated on school property, due to the decision below with a resulting disadvantage to these students.

As indicated in the motion for leave to file this brief, the religious beliefs of these students are of paramount significance in their lives. Group prayer plays a vital role. The lack of sensitivity to this fact demonstrated in the Court of Appeals' decision, is baffling and threatening to these students and their parents. These students and parents recognize the necessity to remove religious indoctrination and worship from the public school curriculum, but they do have trouble accepting the notion that there is something so terribly awful about student prayer and Bible study that no students can meet, even

after school, because there is a "danger" that someone will misinterpret the school board's intentions in accommodating such students. They also fear that the trend of religious families to remove their children from the public schools will be intensified by the decision below, thus further threatening the pluralism of the public school.

Because the decision of this Court with regard to whether to review the Court of Appeals' decision herein is of utmost consequence to the personal rights and liberties of these students and their parents, amicus is vitally concerned that this Court review the decision below.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the petition for certiorari, stressing only that the Court of Appeals held that the school district's policy of permitting students of all groups to gather at the school outside of regular school hours is unconstitutional *on its face*. App. A to Petition for Certiorari, pp. 13a-23a.

ARGUMENT

I. This Case Is One of Great Constitutional and Public Significance Affecting the Rights of Public School Students and Their Parents Nationally.

This case uniquely presents the issue of whether a local school district can constitutionally make *any* noncurricular accommodation of student religious exercise.[1]

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1. The case of *Brandon v. Board of Education of Guilderland School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 71 L.Ed.2d 109 (1981), presented a different issue to the Court in that there the local school district had determined *not* to accommodate student religious gatherings, and the students contended that the Constitution *requires* such accommodation.

The decision of the Court of Appeals condemns the "equal access" policy of the Lubbock Independent School District in such sweeping language that, if this decision is allowed to stand, it will force every school district in this nation to take a stand against accommodation of all voluntary student religious activities, even those occurring outside of regular school hours. The confusion generated by this decision may well cause school attorneys and administrators to believe that they have an affirmative duty to suppress all religious activity on school property, even to the point of restricting the right of a few students to pray together in an isolated spot in a hallway or in the schoolyard when not in class.

This confusion is of great concern to the religious student, who has a deep commitment to the practice of his faith, which includes both individual prayer and group prayer. His religious beliefs are of paramount significance in his life, and the exercise of his religion requires an opportunity to express his faith in prayer and discussion with other students. Such students in Lubbock are now required to conduct their religious activities (some of the students are involved in Fellowship of Christian Athletes, Young Life Club, and a Tuesday morning prayer and Bible study) away from the school grounds. Since many of the students lack independent transportation, such meetings are impractical. Furthermore, when many other groups are permitted to meet on school property, the religious student views his religious activity as singled out for discriminatory treatment. Amicus is further concerned that the decision may tend to adversely affect the present religious pluralism of the public schools by accelerating the tendency of many religious families to remove their children from the public schools, which they view as increasingly hostile to their religious beliefs.

There exists a "happy medium" within the realm of accommodation of private religious exercise which recognizes the needs of the religious student, and yet does not in any way infringe the rights of the non-believer. This decision below, if allowed to stand, will do nothing to help schools or courts find that "happy medium," and the rights of students such as those represented in this amicus group will be trampled needlessly.

II. The Court of Appeals' Decision Is in Conflict With Applicable Principles Established by This Court.

The decision of the trial court striking down the school policies in effect prior to the August 26, 1980, policy was consistent with the decisions of this Court in *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington Township School District v. Schempp*, 374 U.S. 203 (1963). The Court also wisely recognized that whether or not the August 26, 1980, policy infringed the Establishment Clause would depend upon the implementation and administration of the policy. Facially, the policy was not in violation of the Establishment Clause since it simply permits students of all groups to gather at the school, either before or after regular hours, on the same basis as other groups. App. B to Petition for Certiorari, p. 32a.

The trial court decision upholding the revised policy is consistent with *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) and *Board of Education v. Pico*, 73 L.Ed.2d 435 (1982), both of which recognize that students have certain First Amendment rights of expression and association, and that a child is not a mere "closed-circuit recipient of only that which the State chooses to communicate." *Tinker, supra*, at 511. These cases recognize that students are old enough to have some ideas and to express them. The students have also been exposed to a

sufficient number of differing experiences and viewpoints in life that they are able to evaluate the suggestions of their peers and teachers and to make their own judgments. If students need not be protected from the vulgar, obscene material restored to the libraries in the *Pico* case,[2] it seems unlikely that they need to be "protected" from an invitation to attend a before-school or after-school prayer meeting.

The Court of Appeals' decision in this case is inconsistent with the principles of *Tinker* and *Pico*. in that the Court decided that any appearance of accommodation of religion by the school was "too dangerous to permit." App. A to Petition for Certiorari, p. 16a (quoting *Brandon v. Board of Education*, 635 F.2d at 978). Unfortunately, the whole business of the "impressionability" of the students does little to aid Establishment Clause analysis. The idea that just because students are permitted to initiate prayer meetings outside of school ... s means that many or all of the students are going to assume the school wants everyone to be religious is unsubstantiated, not only in the record of this case, but also in normal experience. In any event, the "impressionability" of the students may be to some extent a hopeless whipsaw. If school children are so simplistic and impressionable as to believe that after-school religious meetings bear the "imprimatur" of the school, then it seems that they would also be sufficiently impressionable and simplistic to believe that the refusal to accommodate religious activities to any degree (while other activities are accommodated), amounts to the school's abnegation of religion. Who is to say that it is constitutionally more acceptable for the school to be

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2. Excerpts from the material found objectionable by the local school board are appended to the dissent of Powell, J., 73 L.Ed.2d 466-470.

perceived as hostile to religion, than for the school to be perceived as accommodating to religion?

In the face of the rather sparse record in this case, it seems wise to follow the course chosen by the trial court, which was, in effect, to reserve judgment as to the "primary effect" of such a policy until adequate facts are developed showing whether such a policy does in fact result in a violation of the Establishment Clause. Instead, the Court of Appeals unfortunately decided to follow the superficial conclusions of the *Brandon* case that such accommodation is "too dangerous to permit." App. A at 16a.

The Court of Appeals' analyses on the issues of "secular purpose," and "excessive entanglement" are also clearly faulty. First of all, the Court determines that the policy was written with a religious purpose simply because it "appears in the middle of a policy concerned with religious activities in the schools." App. A, at 13a. It is difficult to imagine where else one would expect to find the policy since paragraph 4 was written as a part of the revisions which the school district made in an effect to comply with constitutional requirements. Nevertheless, amicus submits that the Court of Appeals became so concerned about punishing the school district for what it apparently felt was bad faith (contrary to the District Court, which found the revised policy was in good faith (App. at 33a)) that the Court failed to give guidance to the school district so that the needs of the religious students could be accommodated in a proper fashion. Obviously, to move the location of paragraph 4 within the regulations would simply look like more "bad faith." Therefore, there would appear to be nothing that the School District can do at this point to accommodate any religious activities at all. This punishes the students such as those represented in this group much more than

it does the School District, and the students deeply regret the lack of sensitivity to their rights shown by the Court of Appeals' decision.

The finding of "excessive entanglement" resulting simply from the monitoring of meetings to prevent violence to students and property[4] is not supportable. *Reed v. Van Hoven*, 237 F.Supp. 48 (W.D. Mich. 1965). In fact, as noted in *Widmar v. Vincent*, 70 L.Ed.2d 440, 449, n. 11, the attempt to monitor student meetings in order to suppress religious content is far more "entangling." See also *Chess v. Widmar*, 635 F.2d 1310, 1318 (8th Cir. 1980).

The Court of Appeals' decision is also inconsistent with the principle that religious expression is entitled to the same degree of constitutional protection as speech on other subjects. *Widmar, supra*, at 447. *Heffron v. International Society for Krisha Consciousness, Inc.*, 69 L.Ed.2d 298 (1981). Included in that First Amendment protection is prayer and devotional expression. *Widmar, supra*, at 448 n. 9.

The Court of Appeals' decision is further inconsistent with the principles of individual "voluntarism" and government "neutrality" which underlie the Establishment Clause. *Walz v. Tax Commission*, 397 U.S. 664, 694-697 (1970) (Harlan, J., concurring); *Abington Township School District v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). These principles safeguard the freedom to believe and the freedom to disbelieve by affording protection from government action either actively encouraging or discouraging participation in religion. Neutrality, according

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4. The School District has contended that the words "with supervision" in the policy mean nothing more than the type of "supervision" provided by a uniformed guard at a high school dance or football game. The District Court apparently accepted this contention, which was appropriate in view of the lack of evidence to the contrary.

to Justice Harlan, requires an "equal protection mode of analysis." *Walz, supra,* at 696; cf. *McDaniel v. Paty,* 435 U.S. 618, 631-635 (Brennan, J., concurring). See also Kurland, *Of Church and State and the Supreme Court,* 29 U. Chi. L. Rev. 1, 5 (1961).

Here the school district has adopted a neutral policy, calling for no religious classifications with regard to accommodation of special interest group meetings. The Court of Appeals' decision overturning such policy as facially invalid flies in the face of such principles by negating individual voluntarism and requiring a religious classification which requires the State, in effect, to be "hostile" to religion. App. D at p. 41a (dissent of Reavley, et al., to Denial of Rehearing En Banc); *Chess v. Widmar,* 635 F.2d 1310, 1317 (8th Cir. 1980).

The decision of the Court of Appeals is also inconsistent with the important distinction drawn by this Court between government "sponsorship" of religion and neutral government "accommodation" of the religious activities of private individuals.[5] *Zorach v. Clausson,* 343 U.S. 306 (1952). *Widmar v. Vincent, supra; Walz v. Tax Commission, supra,* at 669. The Court of Appeals leaves these concepts in confusion by suggesting that if any students, acting on their own initiative, influence other students religiously, the Establishment Clause is violated. Moreover, it suggests that simply because someone might perceive the school board as accommodating to religion, the Establishment Clause is violated. Yet the failure to identify the precise evil connected with such appearance of accommodation hinders intelligent balancing of that evil against the interest of the students in exercising their fundamental

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5. Some lower court decisions also reflecting this distinction are *O'Hair v. Paine,* 312 F.Supp. 434 (W.D. Tex. 1969) *aff'd per curiam,* 432 F.2d 66 (5th Cir. 1970), *cert. denied,* 401 U.S. 955 (1971); *O'Hair v. Andrus,* 613 F.2d 931 (D.C. Cir. 1979).

freedoms of speech and religious exercise. It is necessary for this Court to come to grips with this issue in the context of the public school. This case affords that opportunity, indeed the duty, to do so.

The decisions of the Court concerning public school sponsorship of religion have been misconstrued by some lower courts in such a way as to cause the State to turn a "cold shoulder" to the needs and desires of the religious students. The students included in this ad hoc group desire only equal accommodation of their activities—no sponsorship and no favoritism. They desire that the school board be permitted to arrive at a constitutionally valid accommodation of religion. "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission, supra,* at 669. Amicus implores this Court to review the decision below in order to help define the permissible range of public school accommodation of private religious exercise consistent with the purposes of the First Amendment.

CONCLUSION

The students and parents comprising this ad hoc group pray this Court to grant a writ of certiorari in order to give these issues of utmost significance a full and fair consideration.

Respectfully submitted,

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MOTION FILED
NOV 30 1982

No. 82-805

IN THE

Supreme Court of the United States

October Term, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF THE FREEDOM COUNCIL

AND

BRIEF AMICUS CURIAE OF THE FREEDOM COUNCIL

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MOTION FOR LEAVE TO FILE BRIEF OF THE FREEDOM COUNCIL AS AMICUS CURIAE IN SUPPORT OF GRANTING CERTIORARI

The Freedom Council respectfully moves the Court, pursuant to Rule 42, for leave to file the accompanying Brief Amicus Curiae in support of the petition for the grant of a writ of certiorari filed in the above captioned matter. The Petitioners have consented to the filing of this Brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. This Motion is necessitated by Respondent's refusal to consent to the filing of the appended Brief.

As is set out in the statement of Interest of Amicus Curiae found below, amicus feels that it is uniquely qualified to assist the Court in deciding the vital issues presented by the petition herein. Amicus believes that it can add its national perspective to the issues in this case. Moreover, it will address an issue which has not been adequately presented by the parties to date: The intentions of the Framers of the First Amendment.

The issues presented in this case concern the rights of students voluntarily to express their educational, moral, ethical, and religious ideas on the public school campuses of our Nation before or after regular school hours on the same basis as other groups. These rights have been exercised by students since the founding of our Nation. For example, Thomas Jefferson and James Madison, Framers of the First Amendment, in their official capacities as Rector and Member of the Board of Visitors respectively, of the University of Virginia, expressly approved the right of students to meet for religious worship and teaching at

the public University of Virginia. The decision of the Court of Appeals in this case to prohibit such meetings, if sustained, will result in an unparalleled denial of individual freedom in this country. This matter is of direct importance to the activities of members of the Freedom Council, affiliates and related groups, whose student members have heretofore been permitted to use public school facilities for self-directed voluntary religious meetings on the same basis as other campus student groups.

It is the position of the Freedom Council that the decision of the Court of Appeals was incorrect in finding that the guideline in question constituted a violation of the Establishment Clause. In this regard, the Freedom Council wishes to bring to this Court's attention certain historical information concerning the views of Thomas Jefferson and James Madison with regard to the Establishment Clause and its application to student meetings on public school campuses.

For these reasons and those stated in the annexed Brief, it is respectfully requested that the Motion of the Freedom Council for leave to file this Brief as Amicus Curiae in support of petitioners be granted.

Respectfully submitted,

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DATED: November 29, 1982

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BRIEF AMICUS CURIAE OF THE FREEDOM COUNCIL

INTEREST OF AMICUS CURIAE

The Freedom Council, located in Virginia Beach, Virginia, is a non-profit religious corporation with a grass-roots organization established in each of the fifty States. It has representation in each State capital and congressional district throughout the land with additional chapters located on major college campuses. Additionally, The Freedom Council is closely associated with the Maranatha Campus Ministries International, which is established on seventy major college campuses both here and abroad.

The Freedom Council is closely affiliated with the Christian Broadcasting Network. The Christian Broadcasting Network is currently the nation's second largest cable TV network with direct viewing access into 20,000,000 American homes with an additional viewing audience of several million through standard VHF-UHF broadcast stations. The Freedom Council addresses, for the Christian Broadcasting Network and its membership, local and national social issues that have religious freedom implications.

The Freedom Council is dedicated to defending, restoring, and preserving religious freedom throughout the United States. The Freedom Council, and its constituency, is directly concerned with the freedom to exercise religion, as guaranteed by the Constitution, and believes that the decision of the Court below in this matter is both far reaching and of great significance.

Counsel for The Freedom Council have specialized in constitutional litigation, including the Religion Clauses of

the First Amendment. Counsel John W. Whitehead has participated in numerous cases involving the Religion Clauses, serving as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored four books and two law review articles that focus on the interpretation and application of the First Amendment Religion Clauses. Counsel Thomas Stephen Neuberger has also participated in numerous cases involving the Religious Clauses, the First and Fourteenth Amendments, and has co-authored a law review article that focuses on the interpretation and application of the First Amendment Religion Clauses. The Freedom Council believes the combined expertise of its Counsel will be of assistance to the Court. Therefore, this brief is filed to provide the Court with the view of *amicus curiae* on certain legal and historical aspects of this case which to date have not been adequately addressed by the parties.

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the Framers had a different understanding of the degree to which State action constituted "a law respecting the Establishment of religion" from that advanced in the early decisions of this Court reflecting on the Establishment Clause. First, it is clear that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious belief and expression, provided there was no active state sponsorship of any particular religion sect or practice. Moreover, there is important evidence indicating that Thomas Jefferson and James Madison specifically approved of regular religious meetings for worship and teaching by students on public school campuses. This experience of the Framers from Virginia cannot be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedom. The record is clear that the Framers would have sanctioned the guideline in question in the present case.

ARGUMENT

The Decision That Voluntary Student Meetings on Campus for Educational, Moral, Religious or Ethical Purposes Violates the Establishment Clause Is in Direct Conflict With the Intentions of the Framers of the United States Constitution as Expressed in the First Amendment.

A. The Historical Background of the First Amendment.

From this country's inception, the state and its educational institutions have encouraged and accommodated the practice of religion. From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that "[t]he climate of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The promotion of religious expression and freedom was of paramount concern to the Framers of the Constitution and, as they saw it, to the health of the Nation. This concern was clearly expressed in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. Ord. of 1787, Jul. 13, 1787,

Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

The focus of the revolutionary period was not the eradication of religion from the public schools or public life. Instead, it was to ensure that religious exercise be accommodated. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion. . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries on the Constitution of the United States* (2d ed., 1851) 593-95.[1]

1. Justice Story's construction has been corroborated by others. T. Cooley, *Principles of Constitutional Law* 224 (1893); Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 Tex. Tech L. Rev. 1, 2-5 (1978).

The Framers of the First Amendment therefore, never intended a complete separation of church and state. Interestingly, that has never occurred. If the intentions of the Framers are ignored, then, as Justice Douglas predicted:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. Clauson, 343 U. S. 306, 312-13 (1952). The same might be said of the higher law of the Ten Commandments etched in marble in the Chamber of this Court directly above the seat of the Chief Justice. The predominantly religious orientation and history of the American people mitigates against such hostility toward religion. Any rule of separation that the Framers had in mind when they drafted the First Amendment was adopted in a climate of accommodation and benevolence, not of hostility toward religion.

Of course, this is not to suggest that there was no concern that the State not sponsor, compel or actively participate in religious activity. This too was of concern, especially in states where there was no established State Church. In the words of James Madison, the First Amendment Religion Clauses were prompted because "the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to

which they would compel others to conform." Corwin, *The Supreme Court As National School Board,* 14 Law and Contemp. Prob. 3, 11 (1949). The fear of the Framers was that the State would promulgate a statist ideology and force it upon its citizens. To say this, however, is not to say that the Framers would have been apprehensive concerning the desire of a group of students to meet and exchange their ethical, moral, and religious views. The Framers never envisioned, as will be seen in this brief, the situation in the present case where the Constitution would be used to deny the very freedoms they sought to establish.

B. The View of Thomas Jefferson and James Madison.

In its early decisions interpreting the Establishment Clause, this Court turned for guidance to the experience of the Virginia Framers. As Justice Black stated in *Everson v. Board of Education,* 330 U. S. 1 (1947):

> . . . Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

330 U. S. at 11. Justice Black relied heavily on James Madison's *Memorial and Remonstrance against Religious Assessments* and Thomas Jefferson's *Bill for Establishing Religious Freedom* as the basis for engrafting Jefferson's post-First Amendment "wall of separation" phrase into

Establishment Clause doctrine. Subsequent scholarship and this Court's more recent opinions, as will be seen below, have put that metaphor into a more balanced and accurate historical context.

It is doubtful that Madison intended the Establishment Clause to effect as complete a separation of church and state as the Court's opinion in the *Everson* case attributes to him. Madison's initial text for the First Amendment in the House of Representatives was worded "'nor shall any national religion be established', and the first provision adopted in the Senate prohibited any 'law establishing articles of faith or a mode of worship. . . .'" 1 *Annals of Congress* 434 (June 8, 1789); 1 *Senate Journal* 77 (September 9, 1789). Madison's second version, reported from committee in the House of Representatives, read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 *Annals of Congress* 729 (August 15, 1789). Madison's understanding, according to the contemporaneous congressional journal, was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Congress* 730. (August 15, 1789). In view of this record of Madison's participation in the drafting process, his 1785 statements contained in the *Memorial and Remonstrance,* though eloquent and even persuasive in context of a local political fight against levying a tax in support of religious instruction, do not fashion the Establishment Clause into the imposing barrier that a doctrinaire reading of Jefferson's metaphor would suggest.[2] Moreover, a surprising

2. Professor Sutherland has pointed out the dangers of making a metaphor into a rule of law:

The wall of separation is a very satisfying metaphor. It has a fine, tangible sound. No one can doubt what a stone wall is. [and

number of scholars agree that Madison's views of separation of church and state expressed at the framing of the First Amendment were not as absolute as those portrayed in the early Religion Clause cases of this Court. *See* Corwin *supra*, at 10-16; Fahy *supra*, at 78-80; Meiklejohn, *Educational Cooperation Between Church and State*, 14 Law & Contempt. Prob. 61, 71 (1949); Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L. J. 65 (1962); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L. J. 692, 708-709 (1968); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1057-1058 n. 11 (1978); M. Malloin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9-10, 14 (1978); R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 21-36 (1982).

Jefferson was in Paris at the time the First Amendment was introduced and adopted. See Corwin *supra*, at 13. Although his ideas and writing may have influenced the climate for its adoption, there is, unlike for Madison, no direct evidence contemporaneous with the Congress that Jefferson's views did in fact directly influence the debate or drafting of the text of the Religion Clauses. See, e.g., Konvitz, *Separation of Church and State: The First Freedom*, 14 Law & Contemp. Prob. 44, 57 (1949) (whose evidence attributing influence to Jefferson is from years prior to or after the Convention).

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2. (Cont'd.)

then citing Holmes in footnote 15] "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now. . . . Delusive exactness is a source of fallacy throughout the law." *Truax v. Corrigan*, 257 U. S. 312, 342 (1921) (Holmes, J. dissenting).

Sutherland *supra*, at 1311.

Rather than a high and impenetrable barrier, what emerges from study of the relevant utterances of Madison and Jefferson is opposition to active involvement of the State in sponsoring or compelling religious worship and practices or the direct imposition of financial levies in support thereof. Although Jefferson's metaphoric "wall of separation" may not have been "as 'winding as the famous serpentine wall he designed for the University of Virginia' ",[3] it was in Jefferson's time, as much as now, a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman,* 403 U. S. 602, 614 (1971). That the wall of separation was indistinct and variable for Jefferson and Madison is clearly seen in their reaction to issues and facts similar to those presented in this case several years after the adoption of the Religion Clauses.

Jefferson was the founder of the University of Virginia. From its inception, in 1819, the school has been wholly governed, managed and controlled by the State of Virginia. The question of the constitutional limitations with respect to the teaching of religion at the University of Virginia, in particular Christianity, was presented to him. In his annual report as Rector to the President and Directors of the Literary Fund of the University of Virginia dated October 7, 1822, approved by the Visitors of the University of whom James Madison was one, Mr. Jefferson set forth his views in detail as follows:

> It was not . . . to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting

3. *Committee for Public Education v. Nyquist,* 413 U. S. 756, 761 (1973).

from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents therefore, a chasm in general institution of the useful sciences. . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University,* so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. *Such establishments would offer the further and great advantage of enabling the students of the University to attend religious exercise with the professor of their particular sect, either in rooms of the building still to be erected, and destined to that purpose under impartial regulations,* as proposed in the same report of the commissioners, *or in the lecturing room of such professor.* . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion. . . ."

19 *The Writings of Thomas Jefferson* (Memorial ed., 1904) 414-17 (Emphasis supplied).[4] Simply put, Thomas Jefferson, in order to perpetuate and accommodate the religious beliefs and exercise of the students of the University of Virginia, recommended that students be allowed to meet on the campus to pray and worship together or, if need be, to meet and pray with their professors on campus. Jefferson was not opposed to religious worship and study being conducted on the premises of the University of Virginia. To the contrary, he accepted it as being within constitutional parameters. Moreover, it is clear that the so-called "wall of separation between Church and State" that Mr. Jefferson built at the University of Virginia, which he founded, did not exclude religious education from that school. As Justice Reed once said:

> The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

Illinois Ex Rel. McCollum v. Board of Education, 333 U. S. 203, 247 (1948) (Reed, J., dissenting).

James Madison, who with various other Framers was a principal drafter of the First Amendment, was a Member

4. Jefferson's suggestions were adopted by the University of Virginia. The University's regulations drafted pursuant to Jefferson's views provided:

Should the religious sects of this State, or any of them, according to the invitation held out to them, *establish within*, or adjacent to, *the precincts of the University*, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour. (Emphasis supplied) *Regulations of the University* (Oct. 4, 1824) Ch. II, Section 1.

of the Board of Visitors which approved the report Jefferson made as Rector, providing a vivid indication of Madison's views on the constitutionality of voluntary religious worship and education in public schools. Moreover, it is interesting to note that when Congress initially authorized the public schools for the nation's capital, the first president of the school board was Jefferson himself. J. O. Wilson, *Public Schools of Washington*, 1 Records of the Columbia Historical Society 4 (1897). In fact, he "was the chief author of the first plan of public education adopted for the City of Washington." *Id. at* 5. The first official report on file indicates that the Bible and the Watts Hymnal were the principal, if not the only, books then in use for reading by the public school student. *Id.* at 9.

If this Court is to maintain at least some semblance of allegiance to history and the intentions of the Framers, the freedom to associate voluntarily on the campus for moral, ethical, and religious purposes, as petitioners seek to do, should not for the first time in our history be denied. To rule otherwise would not only distort the law but would run contrary to the wishes of the very men who drafted the document upon which we base our freedom.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N. U. L. Rev. 329 (1981). Concerning the mind frame of those who directed the constitutional era and the drive toward separation of church and state, Professor Forkosch writes: "Perhaps the approach was, in some respects, anti-clerical, as a result of Papism, Cromwellism etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution —A Middle Way*, 23 Loyola L. Rev. 617, 632 (1977).

The Court of Appeals decision runs contrary to this central truth. It amounts to a *de facto* establishment in the public schools of what Justice Clark called the "religion of secularism." *School District of Abington Township, Pa. v. Schempp*, 374 U. S. 203, 225 (1963). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 81 Harv. L. Rev. 513, 586-587 (1968) and *Torcaso v. Watkins*, 367 U. S. 488, 495, n. 11 (1961). As one recent observor has said:

> [It is a] legal fiction that schooling can be value-neutral. By its use of the secular-religious dichotomy the Court has been able to eliminate an obvious form of belief manipulation—religious observance—from public schools, but it has thereby implied that the secular content of schooling does not touch upon the basic beliefs and values of the students . . .

Arons, *The Separation of School and State: Pierce Reconsidered*, 46 Harv. Educ. Rev. 76, 97 (1976).

The Court of Appeals decision, however, goes far beyond banning religious observance to the point of banning

discussion of even moral and ethical issues. The petitioners did no more than accommodate their students' moral, ethical and religious interests in much the same way as was done by the Framers. The petitioners chose to accommodate student interests, thus insuring constitutional rights to develop social, intellectual and cultural awareness and in the process accommodate those who desire to express themselves on moral and ethical issues. As Kauper has noted:

> If the government without dictating or coercing belief on anyone's part recognizes the place of religion in the life of the community, and, without preferring one or more religious groups, accommodates its program and the use of its facilities to religious needs and supports activities in which the government and the churches have a concurrent interest and common concern, religious freedom is not placed in jeopardy. On the contrary, it may be argued that the government is thereby contributing to religious freedom and making it more meaningful.

P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

For decades American educators and students have labored under the dark shadow of the layman's belief that the United States Supreme Court has ruled that nothing of a religious nature can take place on the campus of a publicly supported educational institution even if there is no connection between the activity and the school. And this, despite the fact that Justice Clark, the author of the opinion in *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963), attempted on various occasions to make clear that "the Court has specifically held only one thing with specific reference to prayer in the public schools and that is that required prayer in the public

school violates the Establishment Clause."[5] Moreover, Justice Clark has stated:

> Most commentators suggested that the court had outlawed religious observances in public schools when, in fact, the court did nothing of the kind.

Comment, *Constitutional Law-Religious Exercises and the Public Schools*, 20 Ark. L. Rev. 320, 325, 326 n. 44 (1967).

In drafting their Constitution, the people of the State of Texas, echoing the beliefs of the Framers, proclaimed in their preamble: "Humbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution." Never in their wildest imaginations did the drafters of this instrument conceive that one day the U. S. Constitution could be argued in such a manner as to prohibit a group of students from meeting on a public school campus in that state.

The decision of the Court of Appeals conflicts with the intentions of the Framers of the First Amendment. It is essential that the conflict be resolved in favor of the petitioners, and that the Court grant a Writ of Certiorari to review the decision below.

Respectfully submitted,

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DATED: November 29, 1982

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5. Published official transcript of Justice Clark's address as the featured speaker of a symposium on *"Religion and the Public School"* at Wartburg College, Waverly, Iowa (Nov. 5, 1964) 46.

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No. 82-805

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

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United States Senators Mark O. Hatfield, Paul Laxalt, Jennings Randolph, Jake Garn, Pete V. Domenici, Jeremiah Denton, Donald L. Nickles, Slade Gorton, Jesse A.

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Movants' interest in this case arises from their responsibilities as Members of the United States Senate. Each is sworn to support and defend the Constitution of the United States. As described in the accompanying brief, the Senate presently has pending before it proposed constitutional amendments and legislation concerning school prayer, including legislation designed to remove voluntary school prayer cases involving state laws from the jurisdiction of the federal courts. Thus, movants have a substantial official interest in the resolution of the issue presented in this case.

The proposals pending in the Senate are the result of the widespread perception that the lower federal courts, including the Fifth Circuit in the instant case, are interpreting the Constitution in a way that is hostile to religion. As this Court has recognized repeatedly, the Constitution requires state neutrality, not state hostility, toward religion. School boards around the country are in turmoil and confusion about whether they may treat religious activities neutrally, or whether they now must monitor student actions and prohibit voluntary student speech and association with apparent religious content.

The ruling of the court below fails to follow this Court's mandate of neutrality. It has increased the national confusion as to the law and concern as to the attitude of the judiciary toward religion. The question presented in this case should be resolved quickly by the Court in favor of neutrality by granting *certiorari* in this case and reversing the decision of the Fifth Circuit panel.

As representatives of our constituents, and as legislators who must act on this issue in our official capacities, we submit that we are in a unique position to demonstrate to the Court the importance of this issue to the people of this country and the extent to which our constituents are confused by the conflicting interpretations of the Constitution given by the courts on the subject of school prayer. *See, e.g., National Organization for Women, Inc. v. Idaho*, 455 U.S. 918 (1982) (Motions of Senator Jake Garn, *et al.*, and Congressman Thomas P. O'Neill, Jr., *et al.*, for leave to file briefs as *amici curiae* granted). Thus, these Senators request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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December 14, 1982

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LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

BRIEF AMICI CURIAE OF SENATOR MARK O. HATFIELD, SENATOR PAUL LAXALT, SENATOR JENNINGS RANDOLPH, SENATOR JAKE GARN, SENATOR PETE V. DOMENICI, SENATOR JEREMIAH DENTON, SENATOR DONALD L. NICKLES, SENATOR SLADE GORTON, SENATOR JESSE A. HELMS, SENATOR S. I. HAYAKAWA, SENATOR JAMES ABDNOR, SENATOR DAVID L. BOREN, SENATOR DENNIS DeCONCINI, SENATOR WILLIAM PROXMIRE, SENATOR ALAN K. SIMPSON, SENATOR ORRIN G. HATCH, SENATOR ROGER W. JEPSEN, SENATOR PAULA HAWKINS, SENATOR WILLIAM L. ARMSTRONG, SENATOR SAM NUNN, SENATOR ROBERT J. DOLE, SENATOR MAX S. BAUCUS, SENATOR HOWELL HEFLIN, AND SENATOR J. BENNETT JOHNSTON, MEMBERS OF THE UNITED STATES CONGRESS, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The *amici curiae* are elected members of the United States Senate. Each has taken an oath to support and defend the Constitution of the United States. Each serves

at the will of and as the representative of the citizens of one of the several States. Each bears the responsibility of voting upon legislation designed to preserve and protect rights guaranteed by the Constitution of the United States.

Amici do not lightly seek leave to appear before this Court. However, the decision below would require a school board to discriminate against students who wish to use school facilities outside school hours for discussion the school board considers to have religious content. We submit that the decision violates fundamental principles of the First Amendment. The decision treats one of the most divisive social issues of our day. It is an issue involving the deepest convictions and most cherished liberties of the American people.

The issue presented is one that we have been asked to address officially on several recent occasions and one which we will have to address again. The United States Senate has before it constitutional amendments to permit prayer in public schools,[1] legislation to permit prayer in public schools to some degree,[2] and legislation to remove

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[1] S.J. Res. 199, 97th Cong., 2d Sess. (1982), a constitutional amendment proposed by President Ronald Reagan and sponsored by Senators Thurmond and Hatch declares that "Nothing in the Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." An alternative constitutional amendment proposed by Senator Byrd is similar in nature. S.J. Res. 247, 97th Cong., 2d Sess. (1982).

[2] Title IV of S.1378, 97th Cong., 1st Sess. (1981) and S.1577, 97th Cong., 1st Sess. (1981), introduced by Senator Jepsen, would grant every individual the right to participate in voluntary prayer or religious meditation in any public building and would forbid the State from abridging that right. S.2928, 97th Cong., 2d Sess. (1982), introduced by Senator Hatfield, would require public secondary schools that receive federal aid and which generally allow students to meet during non-instructional periods also to permit use of school facilities on an equal basis by students meeting voluntarily for the purpose of religious discussion or prayer.

voluntary school prayer cases arising under state law from the jurisdiction of the federal courts.[3]

The proposals before the Senate are responsive to the widespread perception that the courts are interpreting the Constitution in a way that is hostile to religion. We are of the firm conviction that the decision below is just such a decision and that, if allowed to stand, it will place the judiciary at odds with the people it serves and the Constitution it interprets. The Constitution is not hostile to religion and the prior decisions of this Court do not compel the holding below that it is. Rather, the overwhelming weight of this Court's prior decisions establishes that the Constitution requires the government to maintain *neutrality* toward religion in a way that recognizes and protects the liberties of our students. The holding below improperly requires state hostility to religion and infringes student rights.

This case presents the Court with the opportunity to resolve an issue of unusual importance that is causing widespread confusion and confrontation. Numerous school boards throughout the country are uncertain as to the applicable law on the subject of equal access to school facilities by voluntary student groups.[4] Some, relying on this Court's recent decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), applicable to colleges, believe they must permit voluntary religious activities that are initiated and run by students when they make their facilities available for nonreligious

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[3] S.481, 97th Cong., 1st Sess. (1981), and S.1742, 97th Cong., 1st Sess. (1981), introduced by Senator Helms, would eliminate Supreme Court and federal district court jurisdiction to review and hear any case arising under state law relating to voluntary prayer in public buildings and schools.

[4] *See, e.g.*, 128 Cong. Rec. S11780-86 (daily ed. Sept. 17, 1982). The present confusion is discussed in more detail, *infra*, at 9.

activities. Others, relying on the decision below,[5] believe they are prohibited from doing so. Still others believe that the discretion whether to permit such activities rests with the school boards. A clear rule on this issue is urgently needed. This case squarely presents the Court with the opportunity to announce such a rule.

Amici believe that neither legislation nor a constitutional amendment is required to permit a school to open its facilities for all appropriate student-initiated and student-managed activities including, if the students wish, religious activities. The Constitution already so provides. The Establishment, Free Exercise and Free Speech Clauses of the First Amendment require treatment of such activities in a neutral manner. Consequently, public schools properly may allow students equal access to school facilities for voluntary, extracurricular, religious speech and assembly.

Supreme Court reaffirmation of this neutrality principle will assist *amici* in acquitting their responsibilities as elected officials when acting upon pending legislation and constitutional amendments and when providing guidance to constituents who operate or attend public schools. These *amici curiae* have a substantial official interest in the issue presented in this case, and urge the Court to grant the petition for *certiorari* and to reverse the decision of the Fifth Circuit.

STATEMENT OF THE CASE

On August 26, 1980, the Lubbock Independent School District adopted a policy concerning the use of school facilities during non-instructional periods that provided equal access to voluntary, supervised, student groups for

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[5] The Fifth Circuit decision, reported at 669 F.2d 1038 (5th Cir. 1982), is reprinted as Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed November 12, 1982 ("Petition for Certiorari").

any "educational, moral, religious or ethical purposes."[6] It is neutral on its face. Paragraph four of the policy states:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

The Lubbock Civil Liberties Union challenged this policy under the Establishment Clause of the First Amendment as unconstitutional on its face and as applied.[7]

The District Court held that the equal access policy was not facially unconstitutional. Rather, it "strikes the correct balance between the First Amendment's mandate against governmental establishment of a religion and

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[6] Since this case clearly involves the question whether public school facilities already available to other student groups may be made available on an equal basis to voluntary student groups seeking to engage in religious discussion or prayer, it differs from *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), as that case was presented to this Court.

At the time the decision was rendered in *Widmar v. Vincent*, *supra*, 102 S. Ct. 269, and thus at the time of the denial of *certiorari* in *Brandon*, the Court described *Brandon* as a case "in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause." 102 S. Ct. at 276 n.13 (emphasis in original). The Court subsequently eliminated the reference to *Brandon* in footnote 13 of the *Widmar* decision, *see Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981).

[7] At trial, however, the president of the Lubbock Civil Liberties Union, a professor of constitutional law, testified that the policy was not facially unconstitutional (Tr., at 28) and that despite widespread publicity concerning the litigation respondent had received no complaints concerning the policy as applied. (Tr. at 27-28.)

its protection of the free exercise of religion." [8] The District Court also found that there was no evidence that the policy had been unconstitutionally applied.[9]

The Fifth Circuit Court of Appeals reversed this decision, finding that the School Board's equal-access-to-facilities policy was an unconstitutional establishment of religion. *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982). The Circuit Court held that the policy was constitutionally objectionable because it "appear[ed] in the middle of a policy concerned with religious activities in the schools," [10] because it authorized student meetings "at a time closely associated with the school day" [11] thereby demonstrating "implicit support and approval of the religious meetings," [12] and because the School District, in connection with its statutory responsibilities concerning school property, intended to provide personnel to ensure the protection of school property during the student meetings.[13]

Rehearing *en banc* was denied, with four judges dissenting.[14] The dissenting judges asked: "Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief?" [15] This Court should resolve that question in favor of neutrality, by

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[8] The District Court's unpublished opinion is reprinted as Appendix B to the Petition for Certiorari. The quoted statement is found at page 31a of the Appendix.

[9] Petition for Certiorari, Appendix B, at 33a.

[10] Petition for Certiorari, Appendix A, at 13a.

[11] *Id.*, at 16a.

[12] *Id.*, at 17a.

[13] *Id.*, at 18a-20a.

[14] *See* Petition for Certiorari, Appendix D.

[15] *Id.*, at 41a.

granting petitioner's writ, and by reversing the Fifth Circuit decision.

SUMMARY OF ARGUMENT

The question of whether a school board may open public school facilities to a broad range of student-initiated activities including religious activities or whether the school board must discriminate against activities it considers religious is one which the Supreme Court should resolve now. The Court left this question open in *Widmar v. Vincent, supra*, 454 U.S. at 274 n.14. The holding in *Widmar* and the neutrality principle it espouses point powerfully in one direction. The holding below points in the other. School boards do not know what the law is on a question of great importance to their communities. The Court should eliminate this confusion by announcing a clear equal access rule that can be applied by school authorities nationwide.

This case presents the issue clearly. The policy of the School Board is set forth in writing and has been struck down as unconstitutional on its face. *Certiorari* should be granted because the Fifth Circuit decision conflicts with the settled principle that neutral State policies concerning religion are not unconstitutional, and because the Fifth Circuit decision requires a deviation from such neutral policies that deprives students of their rights of Free Speech and Assembly.

ARGUMENT

Reasons for Granting the Writ

I. This Court Should Grant the Writ to Reduce the Nationwide Confusion Concerning Proper Policies for Religious Activities in Public Schools

Many school boards across the country, genuinely wishing to comply with this Court's rulings, have struggled to resolve the issue of whether students may meet volun-

tarily for religious purposes. Some school authorities have concluded that such meetings cannot be permitted while others, interpreting the same conflicting legal precedents, have reached the opposite conclusion. For example:

—In Sonoma, California, a group of high school students who had been meeting to discuss religious topics was recently disbanded by the school's principal after nearly ten years as a recognized student group. The school district's legal counsel, after reviewing this Court's decision in *Widmar* and the Fifth Circuit's decision in the instant case, advised the principal that *Lubbock* controlled in the high school setting and thus prohibited the group's activities.

—In Anderson County, South Carolina, students have been meeting weekly in school facilities for the past two years before school buses arrived for prayer, Bible study and religious discussions. The students have met on school premises pursuant to a written policy applying to non-student groups allowing use of the school facilities "to promote the general cultural, civic, religious, educational and social welfare of the community." The policy was clarified in November 1982 to make explicit that religious activity is not permitted during the school day. The group may continue to meet under this policy. The local affiliate of the American Civil Liberties Union has threatened to sue the school board if the religious activities continue.

—In Williamsport, Pennsylvania, high school students have sought recognition as a school club for prayer, Bible study, and discussion, and have asked permission to meet on the school premises during the early morning student activity period. Other student groups regularly meet during this activity period. The students' request has been denied based on the opinion of the school district's attorney that recognition of the group would violate the First Amendment. On June 2, 1982, the students filed a

complaint against the school board in federal court seeking a declaration that the refusal to permit the students to meet violates their First Amendment rights.

—In Saddleback, California, a written school policy permitted student groups to meet to discuss issues without regard to content and subject matter. The policy distinguished between sponsored clubs, which received financial support and supervision from the school, and student-initiated groups, which received no such support. A student-initiated group met during the school lunch period to discuss topical issues and read passages from the Bible. The American Civil Liberties Union filed suit against the school board, asking that the policy, as applied, be declared unconstitutional. The suit was dropped when a newly elected school board promulgated a new policy that allows only sponsored clubs.

These examples illustrate the prevailing confusion as local authorities attempt to operate the schools in the face of conflicts between the cases decided by this Court and the lower federal courts. The Court should grant petitioners' writ to resolve this issue by announcing a clear rule for the nation permitting equal access to school facilities.

II. This Court Should Grant the Writ to Uphold the Principle of Neutrality

The Lubbock School Board has formulated a neutral, non-preferential policy that allows equal access to school facilities for all types of student groups wishing to meet. The policy "neither advances nor inhibits religion." *See Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). Merely allowing students to meet for prayer and religious discussions, pursuant to a policy allowing students to meet for a broad variety of purposes, is consistent with this Court's long-established requirement that States act in a manner neutral toward religious and non-

religious activities. This principle was first articulated by this Court, through Mr. Justice Black, in *Everson v. Board of Education*, 330 U.S. 1, 18 (1947):

> [The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

In fact, this Court has consistently required governmental neutrality toward religion. *See Roemer v. Board of Public Works*, 426 U.S. 736, 745-46 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." [footnote omitted]); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."); [16] *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) ("Short of those expressly proscribed governmental acts [governmentally established religion or governmental interference with religion] there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) ("The attitude

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[16] The Court in *Lemon* described the types of neutral facilities and services that school districts can provide:

> Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.

403 U.S. at 616-17. *See also Board of Education v. Allen*, 392 U.S. 236 (1968). The classrooms made available in the present case on an equal basis to all student groups are also neutral facilities.

of government toward religion must, as this Court has frequently observed, be one of neutrality."); *Abington School District v. Schempp*, 374 U.S. 203, 215, 218, 222, 225, 299, 306 (1963); *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.").

The equal access policy instituted by the Lubbock School District satisfies the requirement of neutrality. As this Court stated in *Widmar*, a non-preferential policy permitting all student groups to have equal access to university facilities reflects a secular purpose, 454 U.S. at 271-72, and "[t]he provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect," *id.* at 274. By contrast, the Fifth Circuit's decision in *Lubbock* violates the neutrality principle by requiring the State to become the adversary of public school students who wish to engage in religious activities. Under *Lubbock*, school boards would be required to screen all voluntary groups that are meeting or desire to meet and deny equal access to school facilities when religious content is discovered. Such State involvement is precisely the sort of entanglement that this Court's rulings under the Establishment Clause have sought to prevent. *Widmar v. Vincent, supra*, 454 U.S. at 269, n.6.

III. This Court Should Grant the Writ to Protect Students' Rights of Free Speech and Assembly

This Court has emphatically stated that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Religious discussion and worship are "forms of speech and association pro-

tected by the First Amendment." *Widmar v. Vincent*, *supra*, 454 U.S. at 269. Consequently, students must be permitted to exercise their Free Speech and Association rights, including the right to engage in speech with religious content, unless the conduct "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .' " *Tinker*, *supra*, 393 U.S. at 509, *citing Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). In the instant case there is no indication whatsoever that voluntary meetings outside school hours would disrupt discipline in the school.

Furthermore, this Court has held that where the facilities of a public university are made generally available to students for the exercise of their rights of speech and assembly, they cannot be denied to other students who wish to engage in religious speech and assembly. *Widmar v. Vincent*, *supra*, 454 U.S. 263. The Lubbock School District permits other voluntary student groups to use school facilities. It should also be permitted to allow religious-oriented groups to meet. Indeed, as held in *Tinker*, "the prohibition of expression of *one particular opinion*, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511 (emphasis added). Since students may discuss the inquiry of Jean-Paul Sartre whether there is a God, they should also be permitted to discuss the conviction of Saul of Tarsus, that there is. *See Widmar v. Vincent*, *supra*, 454 U.S. at 277 (Stevens, J., concurring).

Under Supreme Court precedent the Lubbock School District's Board of Trustees must allow student expressions of opinion. The Fifth Circuit decision would require the Board to prohibit student expressions about religion. Such content-based regulation of speech deprives students of their Free Speech rights.

CONCLUSION

Amici curiae respectfully request that the petition of the Lubbock Independent School District be granted to reaffirm governmental neutrality toward religion. *Lubbock* should be reviewed and reversed to assure nondiscriminatory access to public school facilities for voluntary student meetings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

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Respondent.

MOTION OF NATIONAL ASSOCIATION OF EVANGELICALS, THE CENTER FOR LAW AND RELIGIOUS FREEDOM OF THE CHRISTIAN LEGAL SOCIETY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE CHRISTIAN EDUCATORS ASSOCIATION, FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The National Association of Evangelicals, the Center for Law and Religious Freedom of the Christian Legal Society, the Catholic League for Religious and Civil Rights, and the Christian Educators Association, respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*. Petitioner has consented to the filing of a brief by *amici*, but respondent, Lubbock Civil Liberties Union, has refused to grant such consent.

Movants' interest in this case arises from their active participation in and concern for protecting the constitutional rights of students in the public education sys-

tem, particularly as those rights relate to their religious liberties. *Amici* believe that, as a result of decisions by a number of lower courts, including the decision below in this case, there is a growing perception by *amicis'* constituents that the Constitution is being interpreted in a manner hostile to religion.

The ruling of the court below fails to differentiate state-initiated and school-sponsored religious exercises from wholly student-initiated and student-run voluntary meetings with religious content. The net effect of the decision below is to denigrate religious speech on public school campuses.

The question presented in this case should be resolved quickly by this Court in order to remove the unconstitutional burden placed on religious speech by the decision below.

Movants believe that they can present a perspective on the issues raised by this case that will assist the Court in its deliberations. Thus, movants request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The *amici* are four nonprofit membership organizations having a continuing, vital interest in preserving religious liberties under the Constitution. Each of the *amici* enters this case with its own unique perspective on the issues raised.

The National Association of Evangelicals, located in Wheaton, Illinois, is a nonprofit association of evangelical Christian organizations, colleges and universities, as well as some 36,000 churches from 74 denominations. It serves a constituency of 10 to 15 million people through its commissions and affiliates. The Association brings a special expertise to this case as a result of its participation as

amicus curiae in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and its work on proposed legislation to guarantee the rights of free speech and association of students in public secondary schools which was introduced on September 17, 1982, by Senator Mark Hatfield.

The Christian Legal Society (CLS), a nonprofit, tax exempt corporation, headquartered in Oak Park, Illinois, is a voluntary membership organization consisting of more than 3,500 judges, attorneys, law professors, and law students dedicated to furthering Christian values and fellowship in the professional community. The Center for Law and Religious Freedom of CLS marshals legal skills and resources to protect the constitutional guarantees of religious freedom. The Center is closely following several cases and incidents concerning First Amendment rights of public school students to meet voluntarily on campus in meetings with religious content in Illinois, Pennsylvania, Indiana, California, South Carolina, and Washington. In the present case, the Center has established an appeal fund to help pay for the costs and fees arising out of the engagement by petitioner Lubbock Independent School District of the firm of Fulbright and Jaworski to serve as co-counsel in the preparation of petitioner's petition for a writ of *certiorari*. This was done with full knowledge and approval of petitioner.

The Catholic League for Religious and Civil Rights, a nonprofit, tax exempt California corporation headquartered in Milwaukee, Wisconsin, is a voluntary membership organization dedicated to the defense of the rights of all persons of religion and the education of the public respecting issues of religious freedom. Its membership currently stands at approximately 30,000 nationwide. Its interest and expertise in this case are in part derived from its participation as counsel in the case of

Brandon v. *Board of Education of Guilderland School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), which, although distinguishable from the present case, also raised the issue of the right of public school students to meet for religious speech and association before or after official school hours.

The Christian Educators Association (CEA), a nonprofit tax exempt California corporation headquartered in Pasadena, California, is a voluntary membership organization of public school teachers and administrators with over 23,000 members and affiliates. CEA is dedicated to ensuring quality education for public school children. Virtually all states mandate by statute that the public schools provide ethical and moral training for school children in accord with our national heritage. CEA believes that the decision by the Fifth Circuit in this case undermines these mandates and thereby diminishes the quality of education in our public schools.

SUMMARY OF ARGUMENT

The court below ignores critical distinctions between *state*-initiated and sponsored religious rituals and *student*-initiated and run meetings before or after school which have religious content. In so doing, it erroneously applies decisions of this Court concerning state-mandated and sponsored prayer and devotional Bible reading to restrict First Amendment rights of public school students, recognized and protected by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The court below removes from public school administrators the discretion to allow collective religious expression on the school grounds before or after school.

Religious speech is thus denigrated to second class status.

If the neutrality toward religion envisioned by the Constitution is to be preserved, the decision of the court below cannot be allowed to stand.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT IN *ENGEL, SCHEMPP* AND *TREEN*, BY FAILING TO DISTINGUISH STATE-INITIATED RELIGIOUS RITUALS FROM STUDENT-INITIATED AND STUDENT-RUN MEETINGS WITH RELIGIOUS CONTENT.

In its landmark decisions concerning religious activities in public schools, this Court struck down as violations of the Establishment Clause state-initiated religious activities such as teacher-led and school-sponsored prayer and devotional Bible reading. *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). In *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982), this Court affirmed that state-initiated religious exercises violated the Establishment Clause where the school directed a student volunteer to lead the classroom exercise. However, the prohibitions against state-initiated religious exercises in public schools were never intended to bar wholly *student-initiated and student-run* meetings, even though such meetings may contain religious content. As Justice Stewart noted in his dissenting opinion in *Schempp*, 374 U.S. at 318:

> [I]f such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than

to provide an opportunity for the voluntary expression of religious belief.

The policy adopted by petitioner Lubbock Independent School District on August 26, 1980, at issue in this case, allowing all students equal access, before or after school, for voluntary meetings with educational, ethical, moral, or religious content, is precisely the case envisioned by Justice Stewart. Moreover, the policy falls squarely within this Court's rationale in *Engel* and *Schempp*.

The Fifth Circuit's decision to ban certain meetings on campus which are wholly student-initiated and student-run solely on the basis of the religious content of the meeting violates the parameters articulated by this Court. Student-run voluntary meetings with religious content are fundamentally different from state-sponsored religious rituals in public school classrooms. Only this Court can dispel the confusion created by the court below with regard to this critical distinction.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT IN *WIDMAR* AND *TINKER* BY DENIGRATING RELIGIOUS SPEECH TO A SECOND CLASS STATUS.

The decision below cannot be reconciled with the principles articulated in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), and *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See also*, *Healy* v. *James*, 408 U.S. 169 (1972). *Amici* wholeheartedly adopt the discussion and application of the *Widmar* and *Tinker* holdings to this case as set forth in the petition for *certiorari* filed by Lubbock Independent School District.

In *Tinker*, 393 U.S. at 506, this Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Students have the right to express their opinions on controversial subjects on the school grounds so long as they do so without " 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511.

The Fifth Circuit ignores these First Amendment rights for public school students. It effectively denigrates religious speech to second class treatment on public school campuses. The opinion teaches public school children that speech with religious content is taboo and must be eschewed. The four judges who dissented from the denial of rehearing *en banc* recognized the tragic implications of the decision:

> We should not forget . . . that the young student may . . . be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. [We] would consider that a very great wrong to the children, to the Constitution and to the nation.

Appendix D to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed November 12, 1982, at 41a (680 F.2d 424, 426).

A similar concern was expressed by this Court in *West Virginia* v. *Barnette*, 319 U.S. 624, 637 (1943):

> That they [State Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

It is imperative that the dangerous misconceptions as to the meaning of the Establishment Clause propounded by the court below be laid to rest. A denial of *certiorari* may well be perceived by school administrators across our nation as a Supreme Court mandate not to allow any voluntary student meetings containing religious speech. Indeed, incidents have already been reported to *amicus* Center for Law and Religious Freedom in which groups of two or three high school students were forbidden by school administrators to pray on the school lawn, in their parked car, or quietly by their school lockers. If the decision below is allowed to prevail it may be appropriate for public schools to advise students of their constitutional rights by posting the following sign on the schoolhouse gate:

> *ATTENTION STUDENTS:* YOUR BILL OF RIGHTS FORBIDS *ALL* VOLUNTARY RELIGIOUS SPEECH AMONG STUDENTS IN A GROUP OF TWO OR MORE ANYWHERE ON THIS CAMPUS AT ANY TIME.

III. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REQUIRING NEUTRALITY BY THE STATE WITH REGARD TO RELIGIOUS ACTIVITIES.

Over the past three decades, this Court has repeatedly stressed the concept of neutrality by the state with regard to religious activities, including those of public school students.

Justice Douglas, in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), stated:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects

> the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 313-14.

Justice Clark, in *Schempp*, pointed out that the state may not establish a "religion of secularism" in the public schools. He warned that such a religion of secularism is established when the school system affirmatively opposes or exhibits hostility to religion, thus " 'preferring those who believe in no religion over those who do believe.' " 374 U.S. at 225, quoting from *Zorach* v. *Clauson*, 343 U.S. at 314.

Likewise, Justice Goldberg, concurring in *Schempp*, cautioned against an unwarranted extension of the neutrality principle:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. at 306.

Again Chief Justice Burger, in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), reinforced the concept of *benevolent* neutrality when he wrote:

> Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Id. at 669.

Finally, Justice Blackmun, in *Roemer* v. *Board of Public Works of Maryland*, 426 U.S 736 (1976), observed:

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, *but a hermetic separation of the two is an impossibility it has never required.*

Id. at 745-46. (Emphasis added.)

These concerns raised by Chief Justice Burger and Justices Douglas, Goldberg, Clark, and Blackmun were ignored by the court below with the result that benevolent neutrality has been sacrificed on the altar of hermetic separation.

CONCLUSION

For the foregoing reasons, a writ of *certiorari* should be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Court.

Respectfully submitted,

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No. 82-805

In the

Supreme Court of the United States

October Term, 1982

Lubbock Independent School District, et al., *Petitioners*

v.

Lubbock Civil Liberties Union, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of National Council of Churches of Christ in the United States, the United Presbyterian Church in the United States of America and of the Center for Constitutional Studies in Support of Granting the Writ of Certiorari

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Council of Churches of Christ in the United States of America is the cooperative agency of 32 national Protestant and Eastern Orthodox religious denominations, with an aggregate membership of over 40 million people. The National Council of Churches of Christ is organized exclusively for religious purposes, and it is committed to promoting the application of the law of Christ in every sphere of human relations, including education.

On six successive occasions since the decisions of this Court in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963), the National Council of Churches has been instrumental in blocking congressional efforts to overturn this Court's decisions in those cases. For that very reason, this amicus has a vital interest in the correct interpretation of those cases by lower federal and state tribunals, so as not to preclude genuinely voluntary religious association by students outside regular curricular schedule and without state sponsorship or support.

The United Presbyterian Church in the United States of America is a national Christian denomination with churches in all fifty states. It has more than 2,387,000 active members in more than 8,900 congregations, organized into 150 presbyteries and 15 synods. The General Assembly is the highest governing body of the church, meets annually, and is composed of approximately 600 delegates elected by the presbyteries, known as commissioners, one half of whom are ordained ministers; the other half are lay officers known as ruling elders. This brief does not purport to reflect the views of all members of the church, but is based upon policies decided by various General Assemblies.

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher

education, especially church-related colleges or universities. The Advisory Board of this Center is composed of public officials, executives of denominations and religious bodies engaged in education, college administrators, and attorneys knowledgeable in education law. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

In 1978 the Center for Constitutional Studies conducted a nationwide survey of the presidents of all church-related colleges and universities in this country. Amici are in a position to report to this Court facts concerning the interpretation that various federal and state officials have placed upon this Court's historical rulings in *Engel, supra,* and *Schempp, supra,* as these officials discharge their obligation to implement the federal and state regulations governing the use of facilities constructed in whole or in part with the financial assistance sustained by this Court in *Tilton v. Richardson,* 403 U.S. 672 (1971) and in *Hunt v. McNair,* 413 U.S. 734 (1973).

As amici argue in the attached brief, they will undoubtedly be affected by the outcome of the instant litigation, but the amici cannot reasonably expect that their interests will be articulated or defended by the parties in this case.

Amici have tried to obtain consent of both parties to participate in this case. The petitioner has granted such consent, but the respondent is not willing to do so. For the foregoing reasons, amici respectfully move this Court for leave to file the attached brief amicus curiae in support of granting the writ of certiorari.

BRIEF AMICUS CURIAE

INTEREST OF AMICI

The primary focus of the research undertaked by the Center for Constitutional Studies has been on church-related higher education.[1] The vast majority of students enrolled in religiously affiliated colleges and universities attended public elementary and secondary schools. For this reason churches and church-related institutions of higher education that are committed to the integration of religion in higher education have an interest generally in the harmonious interrelationship between the values protected by the No-Establishment clause and the Free Exercise clause of the First Amendment, and more particularly in the preservation of a "benevolent neutrality" on the part of public school officials that would permit truly voluntary participation by student in religious studies and in religious speech without governmental sponsorship or control.

In carrying out its research mission, the Center for Constitutional Studies has come to acquire considerable experience with the interpretations by various federal and state officials of this Court's decisions concerning the Religion Clauses of the First Amendment. Like the judgment of the Court of Appeals in this case, these administrative judgments often go far beyond the holdings of this Court, and the Center is in a position to suggest to this Court the impact that the decision of the Court of Appeals, if uncorrected by this Court, could have on religiousy affiliated higher education.

Other interests of the amici are set forth in the accompanying motion for leave to file this brief.

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[1]See e.g., F. Dutile and E. Gaffney, *State and Campus: State Regulation of Religious Affiliated Higher Education* (forthcoming, 1983); E. Gaffney and P. Moots, *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education* (1982); and P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education* (1979).

SUMMARY OF ARGUMENT

I. By granting review of the judgment in this case, this Court can clarify its teaching concerning the volatile political issue of truly voluntary prayer by students attending public schools.

II. By granting review of the judgment in this case, this Court can reaffirm its teaching concerning the primacy of the value of free exercise of religion in cases of potential conflict with the no-establishment principle, and its teaching that valuable civil rights such as freedom of speech and association are not to be diminished merely because the content of the speech or the goal of the association is religious in character.

III. By granting review of the judgment in this case, this Court can clarify that the historic purpose of the First Amendment Religious Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to prevent the government from imposing any sectarian or denominational belief or practice involuntarily upon the people.

ARGUMENT

I. GRANTING CERTIORARI IN THIS CASE WOULD AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Educational Religious Liberty v. Regan,* 444 U.S. 646, (1980) Justice White wrote that "Establishment Clause cases are not easy; they stir deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale,* 370 U.S. 421 (1962) and in *Abington School District v. Schempp,* 374 U.S. 203 (1963)

have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[2] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[3] As a legitimate exercise of its obligation to promote willing acceptance of its decrees by the people, this Court should seize the opportunity afforded it by the instant case to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer in public buildings, including public school facilities.

The opinion of the Court of Appeals in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings of those cases. This is not to suggest that this

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[2]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of Engel and Schempp on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[3]For an account of the congressional reaction, see Beaney and Beiser, note 2 *supra*. And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same); Comment, "Section 1252: A Jurisdictional Dinosaur," 75 Northwestern U. L. Rev. 175, 176 (1980), and see Amicus Brief filed by several members of the United States Senate in the instant case.

Court should reverse the decisions announced in those cases. For this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson*, 343 U.S. 306 (1952) and *McCollum v. Bd. of Education*, 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach, supra* at 315 (emphasis added). See, e.g., Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978).

No such support is offered for religious instruction by any of the current policies or practices of the petitioner school board. As the Court of Appeals noted, the current policy of the petitioner reads as follows:

> Insofar as religion is concerned, the Lubbock Independent School District adheres to the principle of freedom of religion as expressed in the Constitution of the United States and the Constitution of the State of Texas. 659 F. 2d 1038, 1038, 1040, n. 5.

The procedures adopted to implement this policy are as follows:

> No school employee shall compose, prescribe, or place his/her approval upon any particular prayer or form of religious activity; however, student initiated and directed religious activities will be permitted.

> The Lubbock Independent School District will allow the teaching about religion through study of the Bible for its literary and historic qualities, or of religion, when presented objectively as part of a secular program of education. *Id.*, n. 6.

Ardent opponents of proposed constitutional amendments relating to school prayer have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish the reading of the Bible or recitation of prayers.

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

Id. at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that none of the activity that the petitioners sought to protect was to be sponsored or provided

for by the public school administration, this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

Such clarification is important not only for the ongoing relationship between this Court and other federal and state tribunals engaged in constitutional adjudication. It would likewise be helpful for the myriad federal and state officials charged with executing a variety of programs of financial assistance. As was stated above, the work of the Center for Constitutional Studies is frequently focused on legal issues facing religiously affiliated colleges and universities. In this work the Center has seen administrative interpretations of the constitution purporting to be grounded in this Court's decisions but ranging far beyond their holdings.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1978.[4] One of the results of this study is that the college administrators participating in the study rarely complained of federal regulation as excessively burdensome. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose (e.g., sacred music courses) constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on campuses. By granting certiorari in this case, this Court could clarify for administrative officials that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

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[4]The results of this study were published by the University of Notre Dame Press in 1982 under the title *Government and Campus: Federal Regulation of Religiously Affiliated Higher Education.*

II. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY ITS TEACHING CONCERNING THE PRIMACY OF THE FREE EXERCISE CLAUSE IN CASES OF POTENTIAL CONFLICT WITH THE NO-ESTABLISHMENT PRINCIPLE AND ITS TEACHING CONCERNING THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER IMPORTANT VALUES PROTECTED BY THE FIRST AMENDMENT.

A. THE PRIMACY OF FREE EXERCISE OF RELIGION

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner*, 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707 (1981), *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson*, however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment principle would always be the dominant concern.

Some courts, including the Court of Appeals in the instant case, have assumed that any reasonable accommodation of

religious beliefs and practices would itself constitute an impermissible establishment of religion. See, e.g., *Brandon v. Bd. of Education,* 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division,* 391 N.E. 2d 1127 (Ind. 1979). This Court corrected that error by reversing *Thomas,* 450 U.S. 707, but left standing this view in *Brandon,* cert. denied, 102 S. Ct. 970 (1981), reh. denied, 102 S. Ct. 1493 (1982). As a result, lower courts have felt free to indulge an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, that reduces the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission,* 397 U.S. 664, 668-69 (1970). See also *Sherbert,* supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief"). To turn aside the free exercise claim presented by the petitioners on the basis of the conjecture or the worry that allowing students to pray together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert, Yoder,* and *Thomas.*

It must be stressed that the petitioner's policies do not affect infants, but mature students. The Court of Appeals attempted to distinguish the instant case from the contrary holding in *Widmar v. Vincent,* 454 U.S. 263 (1981), and in *Keegan v. University of Delaware,* 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), on the ground that college freshmen should enjoy significantly greater First Amendment protection than should a high school senior. 669 F.2d at 1043. This view is flawed for several reasons. First, the majority of our citizens complete their formal education and training in high school. Second, the process of maturation is developmental and does not occur magically upon the awarding of a

high school diploma or upon matriculation in a postsecondary institution. One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that religious studies form an integral part of a liberal education.[5] If, as amici maintain, college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, this policy cannot be fostered by stifling the development of religious sensitivities among students immediately before they go to college. Hence, if a court tolls the bell for the right of voluntary religious expression on behalf of high school seniors, amici perceive it as tolling as well for the same freedom that should be enjoyed by college freshmen. It is a gross misunderstanding of the level of their maturity to treat in a paternalistic fashion all of the students whose free speech and associational rights are protected by the current policies and practices of the petitioner, as though all these students were infants incapable of any intelligent, truly voluntary decision-making.

The Court of Appeals completely overlooked the leading decision of this Court concerning the First Amendment rights of public school students, *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1959). Perhaps this omission was due to the reliance by the Court of Appeals on the decision of the Court of Appeals for the Second Circuit in *Brandon.* The *Brandon* court misconstrued *Tinker* to be

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[5]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

limited to *political* speech, asserting that "sensitive Establishment Clause considerations limit their right to air *religious* doctrines." 635 F.2d at 980 (emphasis supplied). *Tinker* may not be read in such a strained, wooden fashion, for although the wearing of a black armband by John Tinker and his companions in the context of a protest to this country's participation in the Vietnam conflict had clear overtones of political protest, the record in *Tinker* makes clear that the meaning of this act as well as its motivation was explicitly religious.[6] Nothing in *Tinker* justifies the decision of the *Brandon* court that the government must allow on public school property sundry forms of political speech, but may ban the voluntary meeting of mature students for purposes of engaging in speech the content of which is religious. By granting certiorari in this case, this Court could reaffirm its teaching concerning the primacy of free exercise values in cases of potential conflict with the no-establishment principle.[7] And this Court could likewise reassert that

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[6]The father of John Tinker is a Methodist minister who was at the time of the act challenged in the lawsuit working for the American Friends Service Committee, an organization founded by Quakers to oppose war and to help solve social problems in a friendly spirit. A. Ginger, *The Law, the Supreme Court and the People's Rights* 200 (1973). The wearing of the armband, coupled with voluntary fasting on two days during the Advent and Christmas season, was a religious act of mourning for the war dead. Even if the acts engaged in by the students had not been so explicitly linked to a traditional religion, these acts were surely within the expansive definition of religion adopted by this Court in the draft cases arising in this period, *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163, 187 (1965).

[7]See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).

students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra,* at 506.

B. THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER FREEDOMS PROTECTED BY THE FIRST AMENDMENT

Not only is the result reached by the Court of Appeals not required by *Tinker;* it militates against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely* 408 U.S. 92, 95-96 (1972). See also *Poulos v. New Hampshire,* 345 U.S. 395 (1953); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Kunz v. New York,* 334 U.S. 558 (1948), and *Tucker v. Texas,* 326 U.S. 517 (1946). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty,* 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law,* 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). When, as here, a public school district makes its facilities available to a wide variety of groups wishing to use them for their meetings during off-school hours, but is enjoined from granting such access only to a voluntary association wishing to use the facility to engage in religious speech, the court has created a content-based restraint which unduly burdens the expression and communication of ideas. See L. Tribe, *American Constitutional Law* 580-582 (1978).

The Court of Appeals did not address the claim of the petitioner that the action of the school board protects the rights of students to freedom of association. The desire to

gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed. 1945).[8]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, it would not constitute a leap from from this Court's precedents to grant to mature students under the circumstances of the instant case the kind of constitutional protection afforded to civil rights groups, *NAACP v. Alabama ex. rel. Patterson,* 357 U.S. 449 (1958), political parties, *Buckley v. Valeo,* 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan,* 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952). To fail to extend to students protected by the policies of the petitioner in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James,* 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib v. University of Missouri,* 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978), would be doubly ironic in that the current policies and procedures of the

[8]See Raggi, "An Independent Right to Freedom of Association," 12 Harv Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

petitioner do not grant official recognition, approval, or support for any activities allowed to occur on public school property. The associational rights of these students should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring); and among these rights should be equal access to public facilities on a neutral and non-discriminatory basis.

By granting certiorari in this case, the Court could reassert its teaching that a state may not unduly burden the free speech rights and the associational rights of students merely because the content of their speech and the purpose of their voluntary association is religious in character.

III. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY THAT THE HISTORIC PURPOSE OF THE FIRST AMENDMENT RELIGION CLAUSES WAS NOT TO STIFLE VOLUNTARY ASSOCIATION FOR THE PURPOSE OF ENGAGING IN RELIGIOUS ACTIVITIES, BUT TO KEEP THE GOVERNMENT FROM IMPOSING ANY SECTARIAN OR DENOMINATIONAL BELIEF OR PRACTICE INVOLUNTARILY UPON THE PEOPLE.

Whether this Court should engage in the writing of legal history in its opinions is itself a debatable matter.[9] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp,* 374 U.S. at 234 (Brennan, J., concurring). This view does not preclude the writing of legal history by this Court; indeed the view was expressed within Justice Brennan's most expansive attempt to account for the history underlying the Religion Clauses.

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[9]See, e.g., C. Miller, *The Supreme Court and the Uses of History* (1969); and literature cited therein; and R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982).

If judges reviewing cases involving the Religion Clauses prefer to resolve such cases by reference to history, they should be aware of the complexity of the historical aims of the Founding Fathers. It is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete contemporary problem.

The Court of Appeals in the instant case did not refer at all to the original intention or meaning of the Religion Clauses. The *Brandon* court on which the *Lubbock* panel relied, however, did attempt an essay in legal history that adopted the oversimplified view that there were simply three different reasons for erecting a high and impregnable wall of separation of church and state. A more serious attempt to account for the history underlying the Religion Clauses than that produced by the *Brandon* court would, in fact, undergird a conclusion opposite from that reached in *Brandon* and *Lubbock*. A simplistic version of the past should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or for denigrating a free exercise claim. In any event, the conjecture that accommodation of that interest would impermissibly establish religion is highly dubious as a matter of history.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to

> flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those espoused by the Court of Appeals. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the petitioners. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their purposes. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over

another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In this view, the Religion Clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964). If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by the *Brandon* court followed by the Court of Appeals in the instant case.

As Professor Tribe has stated, "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By granting certiorari in this case, the Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, amici urge that a writ of certiorari should issue in this case and that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of December, 1982, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Motion for Leave to File a Brief Amicus Curiae and the Brief Amicus Curiae of the National Council of Churches of Christ in the United States and of the Center for Constitutional Studies in support of granting the writ of certiorari to the following attorneys:

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Attorney for Petitioners

Thomas J. Griffith
1208 Thirteenth Street
Lubbock, Texas 79401
Attorney for Respondents

_____

EDWARD MCGLYNN GAFFNEY, JR.

Sworn to and Subscribed before me
the day and year aforesaid.

_____

Rosemary K. Reiter, Notary Public

MOTION FILED
DEC 14 1982

No. 82-805

In The
Supreme Court of the United States
OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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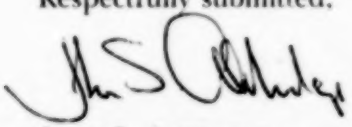
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO FILE BRIEF OF AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

The Texas Association of School Boards respectfully moves this Court for leave to participate as *amicus curiae* herein, for the purpose of filing the attached brief in support of the Appellants' Petition for Certiorari.

Respectfully submitted,



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MOTION TO FILE BRIEF OF AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

MEMORANDUM OF TEXAS ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE ON PETITION FOR WRIT OF CERTIORARI

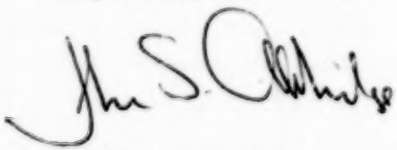
TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Texas Association of School Boards has moved this court for leave to file the attached brief in the capacity of *amicus curiae* in support of the petition for writ of certiorari.

The Association, a nonprofit organization made up of over 1,100 Texas school districts, is concerned with the impact of the case at bar on local day-to-day school operations.

The decision of the court below, rather than provide guidance to school districts, makes it difficult for districts to comply with the requirements of the U.S. Constitution. Statewide, districts have been confused rather than enlightened with the opinion of the court below. It is imperative that the U.S. Supreme Court offer guidance in the area of neutral policies regarding voluntary student religious organizations. Because this Court could offer guidelines that presently do not exist in this area, and because the decision in the Fifth Circuit Court of Appeals will spawn more litigation than it curtails, the Texas Association of School Boards asks this court to grant leave to present the views of its members, who favor the granting of the writ of certiorari.

Respectfully submitted,



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QUESTION PRESENTED

Whether the establishment clause of the first amendment to the U.S. Constitution prohibits voluntary student religious clubs from using public school facilities for meetings outside regular school hours on the same basis as other voluntary student groups.

No. 82-805

In The
Supreme Court of the United States

OCTOBER TERM, 1982

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Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Lubbock Independent School District, its board of trustees, and its superintendent have petitioned for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals reported at 669 F.2d 1038. To seek clarification of the law affecting the school districts it represents, the Texas Association of School Boards, by and through its attorney of record, John S. Aldridge, hereby registers its support for grant of the petition for a writ of certiorari in order to have the judgment of the court below reviewed.

INTEREST OF AMICUS CURIAE

The Texas Association of School boards, a nonprofit organization, has a membership consisting of more than 1,100 school districts in the State of Texas. Its member schools educate over 99% of the student population of elementary and secondary schools in Texas. In an effort to represent and assist local school boards, the Association seeks to express the concerns of its membership, particularly in a case that so significantly affects every school district in the state.

ARGUMENT FOR GRANT OF THE WRIT OF CERTIORARI

The school districts of the State of Texas are anxious to comply with the mandates of the Constitution and the federal courts concerning the treatment of religion in the public schools. Unfortunately, past U.S. Supreme Court decisions in this area have dealt only with statutes and regulations that required prayer or other religious activities during the school day led by school employees. In recent years, lower court decisions, including those of the Fifth Circuit Court of Appeals, have provided some answers, but not to the extent needed by school administrators. Because Texas school districts, including Lubbock ISD, have little guidance in this area, the Association membership would welcome a Supreme Court ruling on the particular practice and policy at issue in this case. The issue is one faced not only by Texas public schools, but by school districts across the United States.

The portion of the policy struck down by the Fifth Circuit in this case states:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups . . . for any educational, moral, religious or ethical purposes so long as attendance at such meeting is voluntary. 669 F.2d at 1041 n.7.

The most recent cases involving prayer established by the schools are fairly clear. For example, the Fifth Circuit ruled that a Louisiana statute permitting voluntary prayer *during* the school day is unconstitutional. In that case, the statute being challenged required teachers to ask for a student volunteer to lead the prayer, and if no one did so, the teacher was required to lead. *Karen B. v. Treen*, 653 F.2d 897

(5th Cir. 1981). Another circuit court ruled that permitting prayers at student assemblies during the school day violated the establishment clause. *Collins v. Chandler*, 644 F.2d 759 (9th Cir. 1981).

Two cases involving more difficult issues, such as student prayer groups, were expected to give some guidance, but failed to answer many school district questions. *Brandon v. Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), and the case at bar involve similar kinds of student groups, who sought to meet on their own in school classrooms immediately before or immediately after school. But there the similarity ends.

In *Brandon*, students, who were not members of an organized group, sued the school district for an injunction. They claimed that they had the right, if they so chose, to meet on school campus immediately before school under the same criteria as other nonreligious groups for the purpose of conducting prayer meetings. The students argued that failure to provide access to the classrooms because of their religious speech would amount to a violation of the free exercise clause.

The Second Circuit concluded that school districts are not *required* to permit students to conduct voluntary prayer meetings under the free exercise clause of the U.S. Constitution. It did not address whether a district *may* so permit. By contrast, the case at bar involves the authority of a school district to provide access to a wide variety of student groups for "educational, moral, religious, or ethical purposes." In the instant case, the court below gave *Brandon* an expansive interpretation, concluding that school districts are actually *prohibited* from treating student religious groups the same as other student groups. While the Fifth Circuit in the decision below cited *Brandon* to support its decision striking down the

Lubbock school district's policy, it did not set out guidelines that school districts can follow. For example, the court cited a statement indicating that a neutral policy could be shown to have a constitutionally permissible purpose, i.e., to encourage students to participate in a wide variety of extracurricular activities. Yet, almost immediately after, the court concluded that the neutral policy of the Lubbock school district violated the establishment clause. The decision of the appellate court is confusing for school districts because on the one hand voluntary meetings are approved and on the other hand are struck down. As the dissent in the denial of Petition for Rehearing stated below: ". . . [I]f it is to be Fifth Circuit law that students of public schools may not meet in school facilities for religious purposes, the court should leave no doubt about it." *Lubbock Civil Liberties Union v. Lubbock Independent School District*, No. 80-2384 (5th Cir. July 16, 1982) (denial of rehearing en banc) (dissenting opinion).

Additionally, the Fifth Circuit opinion places great significance on the fact that the title of the policy was "Religion in the Schools," as opposed to "Student Meetings," for example. Whether that, in itself, is a violation of the establishment clause is an issue that is not clear from the Fifth Circuit decision.

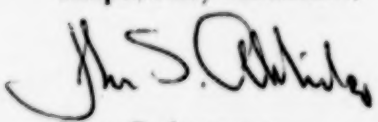
Another item of confusion in the appellate court opinion is the reference to having meetings "at a time closely associated with the school day." In *Brandon* the students were meeting after the buses arrived on school campus, but before classes began. On the other hand, in *Lubbock CLU* the policy permitted students to meet not only before, but also "after regular school hours." How close is "closely associated with the school day"? If the student groups wish to use the school facilities in the late afternoon on the same basis as the local Parent Teacher Association, would the *Lubbock CLU* case require that the trustees deny them access? It is well established

that the first amendment to the U.S. Constitution prohibits a public entity from discriminating against a person or group on the basis of the content of their speech. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Denying access to a student group would require just such a decision, i.e., one based on the content of the speech.

CONCLUSION

The school districts of the State of Texas are charged with the duty of providing an education for children, setting reasonable rules and regulations in operating schools for their students' benefit, and working within the limits of the law in those efforts. The lack of guidance in the area of voluntary student religious meetings makes impossible the job of determining what is legally permitted and what is prohibited. The decision of the Fifth Circuit has served only to confuse school districts, who, in good faith, are seeking to comply with the requirements of the U.S. Constitution. In order to attain answers to questions that thus far have not been answered, the school districts of the State of Texas, through the Texas Association of School Boards, request that the petition for writ of certiorari be granted.

Respectfully submitted,



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December, 1982

CERTIFICATE OF SERVICE

I do hereby certify that true and correct copies of the foregoing Motion, Memorandum, and Brief of Amicus Curiae in support of Appellants' Petition for Writ of Certiorari have been served upon all parties by placing same in the United States Mail, addressed to:

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